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United States

Circuit Court of Appeals

For the Ninth Circuit.

JULIA WHITE CASTLE,

Plaintiff in Error,

vs.

WILLIAM R. CASTLE, LORRIN A. THURSTON and ALFRED L. CASTLE, Trustees Under the Will of JAMES BICKNELL CASTLE, Deceased,

Defendants in Error.

Transcript of Record.

Upon Writ of Error to the Supreme Court of the Territory of Hawaii.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Petitioners' Exhibit "A"—Last Will and Testament of James B. Castle.

I, JAMES BICKNELL CASTLE, of Honolulu, in the Island of Oahu, Territory of Hawaii, being of sound and disposing mind and memory and conscious of the uncertainties of life, do hereby make, publish and declare this as and for my LAST WILL AND TESTAMENT, hereby revoking all Wills heretofore by me made, and particularly that WILL made by me on the 20th day of October, 1897.

I devise and bequeath to my wife, Julia White Castle, the estate known as Mahuilani on Haleakala, Maui. All the rest of my estate, real, personal and mixed, I devise and bequeath to my EXECUTORS AND TRUSTEES hereinafter named, for the following purposes:

FIRST. For the payment of my just debts and funeral expenses.

SECOND. For the following uses and purposes which I will explain in some detail.

I want the business represented by the Hawaiian Development Company, Limited, to go on in the same way as though I *h*ere here. The general plans of development in Kona and Koolau are very familiar to Mr. McStocker and in a broad, general way, to Mr. Withington and Mr. Thurston. I have gone into these various enterprises prepared, if necessary for their successful establishment, to hypothecate all of my securities; but, preferably to the continued burden

of heavy indebtedness, as rapidly as full value may be obtained, by selling some of my old securities, to convert the same into the new enterprises. [1*]

In line with this, it is my present intention, and in case of my decease I desire my Executors and Trustees, if in their discretion it seem best, to convert two thousand (2,000) shares of Alexander & Baldwin, Limited, stock into cash, provided it can be sold for not less than Two Hundred Dollars ($200.00) per share, putting the same into Kona investments, preferably West Hawaii Railroad Company, and into the Koolau Railway Company, either or both. After the Kona Development Company and the sugar enterprise which I have planned to mature from the Heeia Agricultural and Koolau Agricultural Companies' properties shall have become successfully established, I do not wish to expand any further in sugar, but only so far as each mill may become the central factory for the manufacture of sugar from the cane bought of small growers.

I do not bind my Executors to follow the line of development above indicated, but mean to confer upon them the widest discretion as to investment and development.

I hope before many years that franchises of such character may be obtained for both the Koolau Railway Company and the West Hawaii Railroad Company as will simultaneously give to such companies the largest command both of all the resources available for financing the same, and of protecting the pub-

*Page-number appearing at foot of page of original certified Transcript of Record.

lic interests by turning back to the State all the receipts in excess of such interest upon the actual cash invested in the enterprise as may be agreed upon as reasonable. My thought is that such excess would seldom, [2] if ever, be returnable in cash, but in the form of better railroad facilities and equipment, all pointing toward the establishment of an ideal railroad and service to the community in which the railroad is built, and so far as possible such excess as can be foreseen in cash should be utilized in the directions indicated. These companies enabled to own or lease land without limit, should logically become the finest possible agencies for a wise immigration and homesteading by the re-distribution of such lands along the lines of the road. For the carrying out of these general purposes, including in the case of the Koolau Railway, its extension to Honolulu, provided my Executors are satisfied of the ultimate financial soundness of such extension, I wish to empower them completely to deal with any and all securities which I may possess, and otherwise, so far as lies within their power to finance such enterprises as I would have the power to do were I living.

My general aim in this whole matter is not to accumulate a great estate for my family or heirs beyond conserving the estate which I now possess and which may be conservatively valued as worth between a million and a million and a half, but to devote any increase thereof to the purposes hereinafter indicated.

I desire my Executors to appropriate Fifteen Hundred Dollars ($1500) a month to my widow, that being about the amount necessary to maintain Kainalu,

Mahuilani and Puuokoa, [3] Tantalus, if she so desires; that is to say, I desire to have nothing less than this paid to my widow for that purpose, or, if she desires, to apply to her other uses, so long as embarrassing financial conditions do not prevent. Subject to the like qualification, that is, so long as such would not shorten the above-named Fifteen Hundred Dollars ($1500.00) a month being paid to my widow, I desire to continue the payments which I now am making to an old friend and teacher in New York, Mrs. H. K. Hovey, whose present address is No. 7 West 108th Street, New York, Two Hundred Dollars ($200.00) quarterly; and I desire to pay to Dr. T. M. Coan, present address 70 Fifth Avenue, New York City, One Hundred and Fifty Dollars ($150.00) quarterly, for as long as each lives. I desire to assist Dr. N. B. Emerson in his literary work to such extent as may be necessary, not to exceed Six Hundred Dollars ($600.00) a year during his life.

With the successful and profitable establishment, however, of the various enterprises involved, with the requisite income subsequent thereon, I desire to have the amount paid to my widow out of the Estate from its income increased to a sum not to exceed Forty Thousand Dollars ($40,000.00) per annum.

Upon the decease of my wife, Julia White Castle, I desire to continue an income to my son H. K. L. Castle, subject to the following conditions: The minimum not to be less than Five Thousand Dollars, ($5,000.00) per annum [4] unless caused by financial embarrassment or inconvenience, (of which the Trustees shall be the absolute judges); the maxi-

mum not to exceed Forty Thousand Dollars ($40,000.00) per annum, which Forty Thousand Dollars ($40,000.00) shall include the income which he may be receiving from any property which I may give him prior to my decease, including the income from the One Thousand (1,000) shares of stock in Alexander & Baldwin, Limited, herein mentioned, together with that derived from property derived from his mother.

Should the development of the Estate be such as to justify the expansion into other or related lines of business than those already initiated, of which condition my Executors, or a majority thereof, are fully empowered, without qualification, to decide, and its expension through establishment of other enterprises in harmony with the ultimate object of my remaining in active business, namely, to accumulate sufficient land and capital to systematically establish an effort to introduce a high-class agricultural immigration of Northern races, preferably Scandinavian, Anglo-Saxon and Teutonic, then I desire them to expend into such enterprises without hesitation and I hereby empower them amply herein for the purpose.

I have promised my son Harold that if he made himself a perfect success as a business man I would give him on his birthday on July 3rd, 1912, One Thousand (1,000) shares of my Alexander & Baldwin stock, if I then possessed the same, free and unencumbered. It was distinctly understood [5] that I did not intend, in the meantime, to set aside or reserve this from any of my business operations whenever I should choose to utilize the same. In case of

my decease, I desire my Executors, under the conditions set forth in this Will, to transfer to my said son, if living, the One Thousand (1,000) shares before-referred to. I desire that the certificate of his "perfect success as a business man" shall be his employment by Alexander & Baldwin, Limited, from September 3rd, 1907, on which date he entered its service, uninterruptedly by any cause which he could reasonably control, to July 3rd, 1912 aforesaid, to the complete satisfaction of its Manager and Board of Directors, unless his departure therefrom during such period shall be for the purpose of resuming and completing such college training, whether general or special, as he may become convinced of the need and value of as adequate preparation for his business and life work, such departure to be due in no degree to dissatisfaction of Alexander & Baldwin management with his services, and such resumption of College work to be with the cordial approval of J. P. Cooke or his successor as Manager of Alexander & Baldwin, Limited.

After the fulfillment of the requirements upon the estate as above set forth, I desire to have any excess of income, and after the decease of my said wife and son and said other beneficiaries before named, the whole income, (always subject to the decision of the Executors to devote same to any business enterprises whatsoever which they may approve), [6] to accumulate toward an educational purpose to be initiated at such time as their judgment will determine the estate amply able to carry on without closing its commercial character. My strong desire in connec-

tion therewith will, I hope, be made clear by the following statement:

I believe that individuals, communities and nations are depraved and weakened by the excessive accumulation of wealth whenever the character has not become so permeated with a moral force and enthusiasm, as well as habits of a simpler life than that universally consonant with wealth, that the power represented by such wealth remains nothing more than an instrumentality for promoting moral and intellectual enlightenment of the race.

I believe that history shows that the ages of luxury furnish the fertile soil for national decay and that this is the operation of an inevitable law, true alike of the individual and community units composing the nation as of the whole.

I believe that the counteraction of this influence must be accomplished through some channel of education, if at all, and to my observation the injurious influence of unearned comforts is everywhere visible, the schools and colleges not excepted. The problem hereby set to education, as it seems to me, is how may we provide, (or approximate provision for the children of the well-to-do), that training which necessity provides for the children of the poor. I believe that nothing can completely take the place, as one of the most important factors in the development of character, of the habits of work and duty which necessity provides for the large majority. [7]

The nearest approach that I have been able to think of for this training, could be furnished by a boarding school, as it seems to me, in which the stu-

dents and scholars would constitute an absolute democracy as among themselves, with special privileges to none; and it has long been my dream to establish such a school. It would be dominantly an agricultural school, which at once also certifies that it would be located in the country. It would be exclusively a boarding school and not a day school. Its pupils in my conception of what would be most desirable would not return to their homes from the beginning to the end, say, approximately ten months of the usual school year, and I can easily imagine, without being able to elaborate and describe, the development of such a school into a home and family school of the nature that would easily command most of its pupils uninterruptedly for several years. It would be coeducational, the injurious influences of wealth telling, if possible, more fatally against the ought-to-be mothers of the race than the fathers.

The central principle of such a school would be the fact that every student therein would be obliged to earn a certain definite proportion of his or her training and education. That proportion of each child's time would be employed therefor as would be productive for his or her own best good consonant with a wholesome percentage of play, albeit with sports never made the dominant, overwhelming passion that appears to be [8] the case with the colleges, and accompanied by a regime of study contracting with that universal in the schools preparatory to the colleges and universities by the paucity of branches simultaneously required, it being my thought in connection with the book work done in the schools that

it errs very seriously upon the side of quantity rather than quality, and that fewer branches more slowly and thoroughly taught and the allied subjects suggested in the course of such studies more freely followed out therewith, presents a truer and a wholesomer scheme of mental training, the present being as herein suggested, overbalanced.

Such school would become a productive, large farm and I believe that every boy, and especially in a country like this which in its nature must always be dominantly agricultural, should be thoroughly trained as an intelligent agriculturist early in life, and that every girl should be trained in domestic science, so-called. I know of no place where this can be so thoroughly accomplished for both classes, debarring neither from all the opportunities of the other, as in such a farm-school.

Such a school should be run as a farm, with the best ability that can be secured for such a purpose, and the endowment of the school should be calculated to meet the deficit after full value has been credited for the products delivered to market, minus the credits paid the students for work, and the total expenses.

The total expense of such an institution eventually should determine the cost of the education and training to be received by the boys and girls, from such total would be deducted in [9] each scholastic year the value of their work which should be credited to them regularly, operating to reduce the cost of their school year. I believe that such a school could be established and an enthusiastic interest and ambition be instilled after a few years' experience

in dealing with the problems which would arise. The initial tuition payable should be made nominal. The greatest ethical value in the education of character would, I think, develop inevitably under such a system and the conditions of admission would not depend at all upon wealthy parentage but rather the reverse.

I do not wish to impose upon the Executors in establishing and managing any such school the slightest requirement or condition distinctively religious. It is my desire neither to exact nor require, nor debar such observances. I should wish the school at least to be absolutely non-sectarian and non-denominational, my preference being that it should not be a distinctively religious school, although I am keenly appreciative of the beauty and fine influence of organ and religious music in a beautiful chapel. I believe that in conjunction with the methods herein suggested a strong moral sense can be scientifically developed and almost created. This I conceive of as, in its final perfaction of character, epitomizing into two words; unselfishness, which, perhaps, is all-embracing, but to which I add the Love of one's fellow-man, as the inspiring motive and thought in life.

I believe in such a school that the process for developing this trait could be systematically and successfully [10] established. This process is almost totally lacking in families of the wealthy and no amount of admonition or precept can, it seems to me, impregnate the growing child with its fruit. It represents itself to my mind as occupying two stages of development (it being recognized by the child, even

though but theoretically, that the highest aim in life and growth is to do as much good and to confer as much happiness upon one's fellow-creatures as possible), the first stage consisting of the cultivation of the powers of accomplishment through work and training until the point is reached where one becomes entirely self-dependent (incidentally, perhaps, this is a sense to which *inde*pendence might wholesomely be altogether restricted), in order to relieve all others in every respect from one's own dependence; and the second stage, to continue such process of development of the powers of accomplishment through work and training so as to acquire as great a capacity as possible in order, from the excess over one's own necessities so acquired, to bless and help one's fellows.

Kainalu has been willed to me by Mrs. Castle in a codicil dated June 12, 1900, to her will dated October 20th, 1897. I have many times keenly regretted putting the very large amount of money that is there invested in a home for a very small family. Furthermore, I am very strongly convinced that it represents a home of conditions of luxury decidedly prejudicial to the growth of that type of character which I have tried to suggest a favorable school for the attainment [11] of. For a long time I have looked forward to its use eventually in some direction which I felt would be more appropriate, considering the expenditures therein and therefor.

The most practicable and feasible of these, I believe, to be eventually in connection with a large hotel, whenever passenger facilities between the Islands and the Mainland shall have become so rapid, fre-

quent and comfortable as to bring travelers here in sufficient number to render the development of this place profitable in such connection. Failing this, but not advising my Executors positively in either direction, I have thought that it might some day be fitly made a library and art museum, possibly in connection with Oahu College. I do not feel that I am conferring on Harold anything but a real benefit to himself, or more particularly for the training of his family, whenever he shall have one, in diverting this property from its use as his home, believing that he would eventually, if not now, agree with me that a quiet and modest home, with his children brought up to work and not to be waited on perpetually by servants, is the truer life for civilized man and woman.

In this connection I desire that my Executors and Trustees, whenever he may marry, shall, whenever he and his wife shall have selected their location for a home, pay an amount toward the same to his wife direct for such purpose, not to exceed $10,000.00 (Ten Thousand Dollars), unless this contingency shall have already occurred prior to my decease, in which case this clause is to be void. [12]

I hope that my widow and Harold, in case of my decease, will become warmly interested in the carrying on and eventual success of these plans or dreams and co-operate to the best of their ability; and I believe that the suggestions of both, particularly of Mrs. Castle, would be very valuable.

I hereby declare that nothing herein contained shall be construed to require my Executors and Trustees to engage in or carry on any of the business enter-

prises herein enumerated; or, if they do carry them on, nothing herein contained shall be construed as limiting their discretion in the ways and means, or the extent to which the same shall be carried on. I wish, and hereby declare that they shall have the widest discretionary powers in continuing or discontinuing said enterprises, or either of them; and in the ways, means and methods of conducting or carrying them on; and of engaging in and conducting any other business enterprise or enterprises, which they, in their discretion, may consider for the best interests of my estate.

I also more particularly give them discretion to abandon the attempt to introduce and settle immigrants of the Northern races, if, after trial thereof, they, in their sole discretion, shall become convinced that it is impracticable or not successful enough to warrant further expenditure of money.

I hereby specifically authorize and empower my Executors and Trustees to buy, lease or otherwise acquire any property, real, personal or mixed, which, in their discretion, [13] they may deem necessary or proper to carry into effect any of the objects or purposes herein set forth;

And, also, for like purposes, in their sole discretion to sell, convey, exchange or lease either for money, for other property, or by way of compromise, and either for cash or on credit, any property, real, personal or mixed, which may at any time belong to my estate;

And, also, to like purposes, in their sole discretion, to borrow money, on behalf of my estate, either on

open account, or on promissory notes as Trustees of my estate, or by pledge or mortgage, either direct or to a Trustee, of the whole or any part of my estate, and either accompanied or not accompanied by coupon bonds, upon such terms and conditions, rates of interest and time or times when payable, as to them shall seem best;

And, also, the power to invest, change investment and reinvest any moneys at any time belonging to my estate, with sole discretion as to the character of such investments;

And I hereby specially direct that my Executors and Trustees shall not be restricted in the character or class of business in which they may engage or the investments which they shall make, to those ordinarily considered as proper investments for trust estates, but, knowing my desires and objects as they do, both from the statements herein made and from my talk with them, they shall have full power and authority to carry out such desires and objects in such manner as, in their sole discretion, they may deem wise and most likely to effectuate such desires and objects, unfettered by the technicalities and control usually incident to the management of trust estates. [14]

I hereby further direct that if, at any time or times, my Executors and Trustees shall, in their sole discretion, deem it wise to pay a special salary to any one or more of said Executors and Trustees for the purpose of securing special service in addition to the service ordinarily expected from him or them as Executors and Trustees, in addition to the commis-

sions which such Trustee or Trustees would legally receive, they shall have and are hereby given the authority to so employ such Trustee or Trustees and pay said salary or salaries.

I appoint as EXECUTORS AND TRUSTEES, L. A. THURSTON, F. B. McSTOCKER, and D. L. WITHINGTON, and I desire that W. R. CASTLE shall act in the absence or disability of any one of the Executors or Trustees. I desire that, in case of the decease of anyone of said three Executors the remaining two with W. R. Castle shall appoint his successor. And I authorize my said Executors and Trustees to increase their number to a number not greater than five (5) by the addition of said W. R. Castle, or my son Harold K. L. Castle, when he shall have unquestionably qualified for appointment, or by the addition of such other persons as may be selected by said Executors, said action being evident in writing, and I hope that by the time any vacancy by death shall occur, my said son will then unquestionably be qualified for appointment.

I further direct that my said Executors and Trustees be exempt from giving bond or surety for the faithful performance of their duties either as Executors or Trustees. [15]

IN WITNESS WHEREOF, I have set my hand this 13th day of September, A. D. 1907.

(Sgn.) J. B. CASTLE.

Signed, published and declared this 13th day of September, A. D. 1907, as and for his LAST WILL AND TESTAMENT by JAMES B. CASTLE in our presence, who in his presence and in the presence of each other have hereunto signed our names as witnesses.

(Sgn.) HARLEAN JAMES,
Residing in Honolulu.

(Sgn.) WILLIAM L. CASTLE,
Residing in Honolulu.

I, JAMES BICKNELL CASTLE, within named, hereby make, publish and declare this as a CODICIL to my before written Last Will and Testament, hereby reaffirming and republishing said Last Will and Testament in all respects excepting as herein modified, viz.:

I REVOKE the appointment of F. B. McStocker as Executor and Trustee, and also the clause in said will authorizing my said Executors and Trustees to increase their number, and I appoint my son, HAROLD K. L. CASTLE, as an Executor and Trustee in place of said F. B. McStocker, jointly with my other Executors therein named, with like powers and exemption from giving bond or surety; my son having now become unquestionably qualified.

WITNESS *hy* hand this 19th day of August, A. D. 1912.

(Sgn.) JAMES BICKNELL CASTLE.

Signed, published and declared, this 19th day of August, A. D. 1912, as and for a CODICIL to his Last Will and Testament, and as and for the republishment of said Last Will and Testament as herein modified, by JAMES BICKNELL CASTLE, in our presence, who, in his presence and in the presence of each other, have hereto signed our names as witnesses.

(Sgn.) ALBERT N. CAMPBELL,
Residing in Honolulu.

(Sgn.) WILFRID A. GREENWELL,
Residing in Honolulu. [16]

[Endorsed]: Last Will and Testament of James B. Castle. Dated September 13, 1907. Original Will Presented at 11:15 A. M., April 13th, 1918. (Sgn.) B. N. Kahalepuna, Clerk. P. No. 5383. Petitioner's Exhibit "A." (Sgn.) J. C. Cullen, Clerk. [17]

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

AT CHAMBERS—IN PROBATE.

In the Matter of the Estate of JAMES B. CASTLE, Deceased.

Election to Take Dower.

I, Julia W. Castle, widow of the above-named James B. Castle, hereby elected to take dower in the estate of my late husband instead of the provision made for me by the will of my husband admitted to probate herein.

Dated, Honolulu, July 12th, 1918.

(Sgn.) JULIA W. CASTLE. [18]

[Endorsed]: P. No. 5383. Reg. 4, Pg. 239. Circuit Court, First Circuit, Territory of Hawaii. At Chambers—In Probate. In the Matter of the Estate of James B. Castle, Deceased. Election to Take Dower. Filed July 12, 1918, at 2:45 P. M. (Sgn.) Sibyl Davis, Clerk. [19]

In the Circuit Court of the First Circuit, Territory of Hawaii.

AT CHAMBERS—IN PROBATE.

In the Matter of the Estate of JAMES B. CASTLE, Late of Honolulu, T. H., Deceased.

Petition for Allowance of Accounts, Determining Trust and Distributing the Estate.

The petition of William R. Castle, H. K. L. Castle and David L. Withington, respectfully, shows that on the 20th day of May, 1918, they were duly appointed by this Honorable Court executors of the Estate of James B. Castle, late of Honolulu, T. H., deceased, without bond. That on the 17th day of June, 1918, a sworn inventory was filed of all the property and assets of every kind whatsoever belonging to the estate of said deceased; that notice to creditors of the said estate was duly made in the "Pacific Commercial Advertiser," a newspaper printed and published in Honolulu, Territory of Hawaii, for four successive weeks, and that more than six months have elapsed since the first publication of said notice.

That collections of all sums known or believed to be due and collectible for said estate have been made;

that they paid all just claims against and debts of said estate that all the duties required by law or orders of this Court, of which a faithful and prudent appointee should do, have been performed. That Schedules marked "A" and "B," respectively, and made part of this petition, show the receipts and expenditures; also, on Schedule marked "C," and made part of this petition, a true, full and exact summary showing the remainder of property belonging to the said Estate, and upon Schedule "D" hereto attached and made a part of this [20] petition a list of the assets and property in the hands of said executors, and also filed herewith and as a part of this petition a report signed by the executors.

WHEREFORE, it is prayed that upon a day appointed for the hearing of this petition, said accounts be examined and allowed, and that an order be made to deliver over such property as remains to the persons thereto entitled; also, that petitioners be discharged from all further responsibility herein.

(Sgn.) WILLIAM R. CASTLE.
(Sgn.) H. K. L. CASTLE.
(Sgn.) DAVID L. WITHINGTON.

The petitioners above named, being duly sworn, depose and say that the matters set forth in the foregoing petition are true.

(Sgn.) WILLIAM R. CASTLE.
(Sgn.) H. K. L. CASTLE.
(Sgn.) DAVID L. WITHINGTON.

Subscribed and sworn to before me this 15th day of February, 1919.

[Seal] (Sgn.) W. A. GREENWELL,
Clerk. [21]

SCHEDULE "A."

CAPITAL RECEIPTS.

1918.

	Credit balance with Henry Waterhouse Trust Company, Limited, at date of death	$198,588.20
	Cash on deposit with Henry Waterhouse Trust Company, Limited, at date of death, pledged to purchase Territorial Bonds	20,000.
	Cash on deposit with Henry Waterhouse Trust Company, Limited, at date of death, pledged to purchase Liberty Bonds	30,000.
June 15.	By equitable Life Assurance Company, policy 306565	5,076.07
June 24.	By New York Life Insurance Company, policy 3656598	110,000.
July 5.	By Mutual Life Insurance Company, policy 393957	5,001.84
July 16.	By Oahu Shipping Company, Limited, principal of note dated March 8, 1918	40,000.
July 17.	By E. P. Low, principal of his note	11,328.14
July 17.	By sale of 63 shares of Oahu Shipping Co., Ltd	777.66
Aug. 22.	By sale Koolau Agricultural Company, Limited, and Koolau Railway Company, Limited, stock as finally adjusted $86,825 cash, notes $57,500, $50,000 and $44,682.80, total	239,007.80
Oct. 5.	By Kona Development Company, Limited, principal of note dated March 30, 1918	10,911.73

Oct. 5.	By Kona Development Company, Limited, principal of note dated May 20, 1918	46,492.91
Oct. 18.	By sale of Kaipapau to Julia W. Castle...	1,000.
Dec. 12.	By refund Federal Income Tax.....	1,303.22
1919.		
Jan. 13.	By sale 2677 shares Kona Agricultural Company, Limited, stock of W. R. Castle	12,000.
Jan. 13.	By sale South Kona lands to W. R. Castle.	6,800.
Jan. 13.	By T. Konno, a/c principal of mortgage..	200.
Jan. 31.	By Maui Agricultural Co., Ltd., a/c exchange Sugar Factors stock exchanged for $46,175 Liberty Bonds.....	192.85
Feb. 4.	By W. R. Castle, Tr. balance principal Konno note	2,800.
Feb. 12.	By Kona Development Company, Limited, principal of note dated February 28, 1918	41,838.18
		783,318.60
	N. B.—Of this total of $783,318.60 there are included notes of $57,500, $50,000 and $44,682.80 above referred to, a total of.....	152,182.80
	Balance.....	631,135.80

[22]

INCOME.

1918.		
May 31.	Sugar commissions for month of May, 1918 .....$	354.91
June 30.	Sugar commissions for month of June, 1918	624.60
July 2.	F. J. Snow, rent Olaa lands for year ending June 30, 1919.....	60.

July 11.	Chas. Akana, rent Manoa lands for year ending December 31, 1918.....	100.
July 15.	Sundry rents and interest from South Kona property	818.85
July 16.	Interest on Oahu Shipping Company note of $40,000 at 8% from March 8 to July 16, 1918	1,137.80
July 17.	Interest on Eben P. Low note of $11,328.14 at 7% from —— to July 17, 1918.....	561.70
July 29.	By Shipman and White,	
	(a) Rents	54.36
	(b) Taxes on leasehold.....	17.20
July 29.	Rent Kaneohe Ranch Company to 12–31–17	12.50
Aug. 7.	Coupons Hawaii Territory bonds.....	400.
Aug. 19.	By Thomas Wah King, interest at 7% on $8000 for six months ending August 16, 1918	280.00
Aug. 31.	Sugar commissions for month of August.	2,865.11
Sep. 14.	By sundry rents, South Kona land.....	41.50
Sep. 18.	By Liberty loan coupons.....	446.96
Sep. 30.	Sugar commissions for month of September	288.93
Oct. 5.	By Kona Development Company, Limited, interest on note of $10,911.72 from March 30 to October 5, 1918, at 6%...	336.45
Oct. 5.	By Kona Development Company, Limited, interest on note of $46,492.91 from May 20 to October 5, 1918, at 6%.....	1,046.09
Oct. 30.	Sugar commissions for month of October..	869.34
Nov. 26.	By Kaneohe Ranch Company, Limited, rent to December 31, 1918.....	25.00
Dec. 6.	Sundry rents South Kona land.....	100.00
Dec. 31.	Interest on credit balances with Henry Waterhouse Company, Limited, at 4% to date	8,690.26

1919.		
Jan. 23.	Remittance W. M. McQuaid, rent and taxes South Kona lands.....	27.80
Jan. 23.	Remittance from W. M. McQuaid, rents South Kona lands	103.17
Jan. 28.	Interest on credit balances with the Henry Waterhouse Trust Co., Ltd., at 4% to date	1,348.57
Jan. 28.	By F. J. Snow, rent Olaa lands to December, 1919	30.00
Feb. 4.	Interest on balance of Konno note of $2800 from Dec. 28, 1918, to date.....	21.77
Feb. 12.	By Kona Development Company, Limited, interest on note of $41,838.18 at 6% from February 28, 1918, to date.....	2,396.52
Feb. 8.	Rent Manoa lands to 6–30–19.....	136.60
		23,195.99
Feb. 5.	Coupons Hawaii Territory bonds.....	400.
		23,595.99

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SCHEDULE "B."

CAPITAL PAYMENTS.

1918.		
May 6.	Purchase Liberty Bonds.....$	30,000.
May 20.	Loan to Kona Development Company, Limited, note of even date.....	46,492.91
July 2.	Purchase Territorial Bonds at 98.04.....	19,943.55
Dec. 27.	Loan to T. Konno, secured by mortgage on real estate	3,000.
1919.		
Jan. 14.	Sugar Factors stock, one-half principal and interest of note	32,839.54
		132,276.00

CLAIMS PAID.

1918.

June 24.	New York Life Insurance Company note, principal and interest	65,169.72
June 25.	Hawaiian Electric Company	1.20
June 25.	Schubert Quarter	40.
June 25.	City Transfer Company	4.
June 25.	H. H. Williams, Undertaker	179.
June 25.	Ah Chew Brothers	74.
June 25.	Benson, Smith & Company	4.90
June 25.	Wall & Doughterty	8.75
June 25.	Alexander & Baldwin, Limited	200.
June 25.	Dr. Augur	175.
June 25.	Cameron & Johnstone	10.
June 25.	Honolulu Gas Company, Limited	12.50
June 25.	P. L. Weaver	377.
July 5.	Miss Toor	90.
July 25.	Federal Income Tax 1917	574.86
July 30.	Chas. E. Lauriat	16.17
July 30.	Bretano's	28.87
Aug. 30.	Note of W. R. Castle dated December 8, 1916	5,000.
Aug. 30.	Interest on same from Dec. 8, 1916, to Aug. 30, 1918, at 6%	518.33
Oct. 7.	Castle & Withington	
	(a) Fee for drawing agreement of sale, deed mortgage and note Pelekunu land	30.00
	(b) Advice re Federal Income Tax	25.
Nov. 20.	Chas. E. Lauriat	50.
Nov. 25.	Castle & Withington, services drawing deed Hawaiian Board to J. B. Castle	12.
Nov. 27.	Nelson for awnings	425.

1919.

Feb. 12.	To Henry Waterhouse Trust Company, Limited, assignee of the McQuaid claim	5,000.
		78,026.30

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ADMINISTRATION EXPENSES.

1918.

Apr. 12.	Costs filing petition for administration, Voucher ——	17.
Apr. 26.	Certificate re proofs of death, Voucher ——	3.
Apr. 27.	Affidavit re proofs of death, Voucher ——	5.50
May 18.	To Castle & Withington on a/c fee, Voucher ——	250.
May 20.	Notice to creditors, Voucher ——	4.50
May 20.	To Henry Smith, two oaths on proof of death, V. ——.....	1.
May 20.	Three certified copies letters testamentary, V. ——	3.
May 29.	Wireless to McQuaid, Voucher ——.....	1.55
June 15.	Allowance Julia White Castle, two months ending June 5, 1918, Voucher ——....	3,000.
June 18.	Territorial taxes "Kainalu" first half 1918, real and personal Voucher ——..	1,095.
July 5.	Allowance Julia White Castle, month ending July 5, 1918, Voucher ——.....	1,500.
July 23.	Certified copy letters testamentary, Voucher ——	1.50
July 30.	Appraisers' fee, Voucher ——.....	10.
Aug. 5.	Allowance *July* White Castle to August 5, *1818*, Voucher ——	1,500.
Aug. 17.	To H. K. L. Castle and D. L. Withington, expenses Hawaii trip, Voucher ——	76.65

Aug. 26.	Internal Revenue stamps on sale of stock of Koolau Agricultural Company, Limited, and Koolau Railway Company, Limited, Voucher ——.....	26.64
Aug. 29.	Costs of court on application for authority to assign lease and convey property at Koolau, Voucher ——.....	5.00
Sep. 9.	Allowance Julia White Castle for month ending September 5, 1918 ——.....	1,500.
Oct. 1.	To Hideo Emoto family, settlement in full, V. ——	100.
Oct. 7.	To Castle & Withington, services preparing documents and acknowledgments on sale of land to Koolau Agricultural Company, Limited, Voucher ——.....	120.
Oct. 9.	Julia White Castle, allowance for month ending October 5, 1918, Voucher ——.	1,500.
Oct. 25.	To Mow Wong, settlement in full, Voucher ——	468.
Nov. 12.	To Julia White Castle, allowance for month ending November 5, 1918, Voucher ——.....	1,500.
Nov. 15.	To taxes on Kona property, last half 1918, V. ——.....	26.55
Nov. 25.	To H. K. L. Castle, services in connection with the sale of Koolau Agricultural Company, Limited, and Koolau Railway Company, Limited, stock, V. ——.....	175.
Nov. 25.	To Territorial taxes "Kainalu," real and personal, last half 1918 Voucher ——..	1,094.95
Dec. 6.	To Julia White Castle, allowance for month ending December 5, 1918, Voucher ——.....	1,500.
Dec. 13.	To two certified copies letters testamentary, V. ——.....	3.

1919.

Jan. 13.	Internal Revenue stamps on transfer of 2678 shares Kona Agricultural Company, Limited, stock and on deed W. R. Castle, Voucher ——.....	18.72
Jan. 13.	To costs on petition for authority to execute mortgage, etc.....	11.50
Jan. 14.	To Julia White Castle, allowance for month ending January 5, 1919, Voucher ——	1,500.
Feb. 5.	To Julia White Castle, allowance for month ending February 5, 1919, Voucher ——.....	1,500.
Feb. 5.	To Castle & Withington to services on the estate, Voucher ——.....	2,250.

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ADMINISTRATION EXPENSES (Continued).

1919.

Feb. 8.	To titus M. Coan, annuity for nine months ending January 5, 1919, Voucher ——.	450.
Feb. 13.	To Costs on filing petition for closing estate, Voucher ——.....	10.
Feb. 13.	To Executors' fees, Voucher ——.....	24,482.15
1918.		
July 15.	Expenses as per McQuaid's list of July 15, 1918, Voucher ——.....	623.85
		46,327.06

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SCHEDULE "D."

ASSETS AND PROPERTY ON HAND.

Personal Property.

Note, Joseph F. Smith, Trustee, dated August 22, 1918	$57,500.
Note, Joseph F. Smith, Trustee, dated August 22, 1918	50,000.
Note, Joseph F. Smith, Trustee, dated August 22, 1918, for $50,000, on which there is unpaid principal	44,682.80
Note, Thomas Wah King, secured by mortgage on real estate, dated February 14, 1918, for	8,000.
War Savings Stamps	832.
Library	
Furniture	
299 shares Kaneohe Ranch Company Limited.	
399 shares Heeia Agricultural Company, Limited.	
2000 shares Hawaii Hardwood Company, Limited.	
5000 shares Western Consolidated Oil Company.	
499 shares Hawaiian Development Company, Limited.	
20 shares Oahu Country Club.	
20 Territorial bonds, denomination of $1,000 each.	
4 bonds 3rd Liberty Loan, denomination of $5,000 each.	

10 bonds 3rd Liberty Loan, denomination of $1,000 each.
Liberty Bonds in transit having a face value of ..... $46,750.

Real Estate.

44 acres of land at Manoa, Oahu.
2.96 " " " " Koolau, "
186.25 " " " " Olaa " [27]

SCHEDULE "C."

FINAL ACCOUNT OF WILLIAM R. CASTLE, H. K. L. CASTLE AND D. L. WITHINGTON, EXECUTORS OF ESTATE OF JAMES B. CASTLE.

The Executors charge themselves with the following sum as per Schedule "A," $631,135.80 hereto annexed and asks to be allowed the following sum, as per Schedule "B," hereto annexed, $256,629.36.

We HEREBY CERTIFY that the foregoing account, and the Schedules marked "A" and "B," hereto annexed, and the vouchers herewith produced and filed, are full, true and correct statements of all sums received and paid out by us, or in our behalf, as said Executors up to and including the 15th day of February, A. D. 1919.

(Sgn.) H. K. L. CASTLE.
(Sgn.) WILLIAM R. CASTLE.
(Sgn.) DAVID L. WITHINGTON.

Subscribed and sworn to before me this 17 day of February, A. D. 1919.

[Seal] (Sgn.) W. A. GREENWELL,
Notary Public.

NOTE.—Write "Receipts-Schedule A" on first sheet of moneys received: and write "Payments-Schedule B" on first sheet of moneys paid.

Referred to Henry Smith, as Master, this 18th day of February, 1919.

(Sgn.) C. W. ASHFORD,
First Judge.

[Endorsed]: P. No. 5383. Reg. 4, P. 244. Circuit Court, First Circuit, Territory of Hawaii. In Probate. In the Matter of the Estate of J. B. Castle, Honolulu, Hawaii, Deceased. Final Account of Executors. Filed at 3:10 o'clock P. M., February 17th, A. D. 1919. (Sgn.) B. N. Kahalepuna, Clerk. [28]

[Endorsed]: P. No. 5283. 4/244. Circuit Court, First Circuit, Territory of Hawaii. In the Matter of the Estate of James B. Castle, Late of Honolulu, T. H., Deceased. Petition for Allowance of Accounts, Determining Trust and Distributing Estate. Circuit Court, First Circuit. Filed Feb. 17, 1919, at 3:10 o'clock P. M. (Sgn.) B. N. Kahalepuna, Clerk. Castle & Withington, Attorneys for Petitioners. [29]

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

AT CHAMBERS—IN PROBATE.

In the Matter of the Estate of JAMES BICKNELL CASTLE, Deceased.

Supplemental Final Account.

To the Honorable C. W. ASHFORD, First Judge First Circuit Court, Territory of Hawaii:

Yours executors present a supplemental account and supplemental Schedules "A" and "B" of additional income received and administration expenses paid out, and ask that the same may be allowed with the account heretofore presented.

Your executors further represent that they have agreed with the widow, Julia White Castle, that in the computation of her dower the notes shall be computed at their face value, the War Savings Stamps, Library, Furniture, stock in the Kaneohe Ranch Company, Limited, Heeia Agricultural Company, Limited, Western Consolidated Oil Company and Hawaiian Development Company, Limited, at the amount set out in the appraisal, and that in its computation the stock of the Oahu Country Club and Hawaii Hardwood Company, Limited, as of no value, and that the Territorial and Liberty Bonds shall be estimated at their face value; that the said Julia White Castle shall receive as a part of her dower, at the value set out in the appraisal:

299	shares Kaneohe Ranch Company, Limited	$ 75,000
399	shares Heeia Agricultural Company, Ltd	10,000
	Library	6,000
	Furniture	500
	Carried forward	$ 91,500

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	Brought forward	$ 91,500
	Note of Joseph F. Smith, dated Aug. 22, 1918	57,500
6	Territorial Bonds, denomination $1000 each, numbered 555–560	6,000
12	First Liberty Loan Bonds, $1000 each, numbered 62656–62667	12,000
10	Third Liberty Loan Bonds, $1000 each, numbered 162282–162291	10,000
4	Fourth Liberty Loan Bonds, $1000 each, numbered 202280, 202281, 270355, 270356	4,250
5	Fourth Liberty Loan Bonds, $50 each, numbered 13904137–13904141	
		$181,250

All remainder of the personal estate of every description shall pass to the trustees, and estimated at the values set out in the appraisal, but there shall be first paid to the said widow, Julia White Castle, $1000 out of the estate for her dower interest in the real estate and to equalize these items.

The executors waive any right to any compensation in regard to the $50,000 which was deposited sepa-

rately with the Henry Waterhouse Trust Company, Limited, and used in the purchase of Government bonds, and desire that a recomputation be made.

Your executor, Harold K. L. Castle, declines to accept the appointment as a trustee, and the trustees then named would be William R. Castle, L. A. Thurston and David L. Withington.

Dated, Honolulu, March 24, 1919.

Respectfully submitted,

(Sgn.) WILLIAM R. CASTLE.

(Sgn.) H. K. L. CASTLE.

(Sgn.) DAVID L. WITHINGTON.

Executors, Estate of James B. Castle.

I hereby assent to the foregoing.

JULIA WHITE CASTLE.

By (Sgn.) H. K. L. CASTLE,

Her Attorney in Fact.

Subscribed and sworn to before me this 24 March, 1919.

[Seal] (Sgn.) W. A. GREENWELL,

Notary Public. [31]

SUPPLEMENTAL SCHEDULE "A."

INCOME.

1919.

Feb. 28.	Interest on credit balances with Henry Waterhouse Trust Company, Limited, for month ending February 28, 1919....	$1,387.26
Mar. 15.	Interest on notes of Joseph F. Smith to February 22, 1919...	4,183.03

"	21.	Interest on credit balances with Henry Waterhouse Trust Company, Limited, to March 28, 1919	1,324.40

SUPPLEMENTAL SCHEDULE "B."

ADMINISTRATION EXPENSES.

1919.

Mar.	15.	To Julia White Castle, allowance for month ending March 5, 1919	1,500.
"	19.	To Cameron & Johnstone, services Federal taxes	100.
"	21.	To Julia White Castle, allowance 23 days to March 28, 1919.....	1,150.
"	"	To Executors' fees on $6,894.69 at 5%	344.73
"	"	To Rent of deposit box with the Henry Waterhouse Trust Company, Limited, for one year....	20.

[32]

[Endorsed]: P. No. 5383. 4/239. Circuit Court, First Circuit, Territory of Hawaii. In the Matter of the Estate of James Bicknell Castle, Deceased. Final and Supplemental Report of Executors. Filed at 3:45 o'clock P. M., March 24, 1919. (Sgn.) B. N. Kahalepuna, Clerk. Castle & Withington. [33]

In the Circuit Court of the First Circuit, Territory of Hawaii.

AT CHAMBERS—IN PROBATE.

In the Matter of the Estate of JAMES B. CASTLE, Late of Honolulu, Hawaii, Deceased.

Order Approving Accounts, etc.

Whereas, William R. Castle, David L. Withington and H. K. L. Castle, as executors under the will and of the Estate of James M. Castle, did on the 17th day of February, 1919, file in this Court a petition showing that on the 20th day of May, 1919, letters testamentary were duly issued to them out of and under the seal of the above-entitled court; that on the 17th day of June, 1918, was filed a sworn inventory of all the property and assets of said estate which have come to their possession or knowledge; that notice to creditors was given in manner and form prescribed by law by publication in the "Pacific Commercial Advertiser," a newspaper printed, published and circulated in the First Judicial Circuit of the Territory of Hawaii, once a week for four successive weeks, and that more than six months have elapsed since the first publication of said notice; that as such executors they have collected all sums and amounts of money due to said deceased which can be collected; that as such executors they have faithfully performed and discharged all the duties required by law or by the orders of this court to be done and performed; that on Schedules "A," "B" and "C" annexed to said petition and made a part thereof, is exhibited and

shown an account of all receipts and expenditures [34] made by them for and on behalf of said estate; also of all property remaining in their hands belonging to said estate subject to distribution, praying that said account may be examined and approved and that they may be discharged from any and all further and future liability or responsibility under their trust as such executors, and that an order of distribution of the property remaining in their hands be made to the persons entitled thereto, and said estate finally closed.

Order to show cause was returnable on the 28th day of March, 1919, at 2 o'clock P. M., before this court, at Chambers, in the Judiciary Building, in Honolulu, which said order further required that notice be given by publication in the manner by statute provided.

That on the 28th day of March, 1919, Messrs. Castle & Withington and Arthur Withington, Esq., appearing on behalf of the petitioners, and F. M. Hatch, Esq., appearing for and in behalf of the widow, Julia W. Castle, and the Territory of Hawaii by Harry Irwin, Esq., Attorney General, and H. K. L. Castle all being present in court, and upon due proof of the publication of notice of said order in the manner and for the time therein specified, and upon due proof that said executors have faithfully discharged the duties of their trust according to law and the orders of this Court, except the payment to Harold K. L. Castle of the annuity provided in said will, and no objection being made by those present in court as aforesaid,

NOW, THEREFORE, it is ordered that said final account be and the same is hereby approved, allowed and settled.

And the said H. K. L. Castle, in open court having waived his right to act as such trustee, and it appearing to the Court that no objection exists to the appointment of William R. Castle to be substituted to the place of said H. K. L. Castle as such trustee,

NOW, THEREFORE, it is hereby ordered that the renunciation of said H. K. L. Castle be accepted, and William R. Castle is hereby appointed as trustee in his place and stead. [35]

And it further appearing to the Court that the widow, Julia W. Castle, and the executors have entered into an agreement and method, under and by the terms of which it set apart to her her dower rights in the personal property of the estate, other than the proceeds of life insurance, NOW, THEREFORE,

IT IS ORDERED AND DECREED that the agreement and method of said partition or division between the widow, Julia W. Castle, and the executors, setting apart to her her dower rights in the personal property of the estate, other than the proceeds of life insurance, be and the same is hereby approved.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the widow, Julia W. Castle, be and she is hereby entitled, by way of dower, to participate in and receive from the executors one-third (⅓) of the aggregate net amount collected by them upon the policies of life insurance listed among the assets of the estate.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that WILLIAM R. CASTLE, L. A. THURSTON and DAVID L. WITHINGTON be and are hereby appointed trustees upon and under the trusts and in accordance with the provisions set forth and contained in the will of James B. Castle.

IT IS HEREBY ORDERED, and said executors are directed and authorized, upon first retaining in their possession and control funds sufficient to pay all prospective or probable Federal or Territorial succession taxes, and all prospective or probable attorneys' fees and costs of further litigation herein, in the total sum of $85,000, to make distribution of all the property remaining in their hands as such executors, to the widow, Julia W. Castle, her dower right as set apart to her under the agreement and method of division between her and the executors as hereinabove referred to, and also a one-third of the aggregate net amount [36] collected by the executors upon the policies of life insurance listed among the assets of the estate, and the remainder to William R. Castle, L. A. Thurston and David L. Withington, the trustees appointed herein under the provisions and trusts set forth and contained in the will of James B. Castle.

Jurisdiction is hereby retained to make and enter any other order or orders, decree or decrees from time to time upon the petition for allowance of accounts, determining trust and distributing the estate filed herein February 17, 1919.

Dated, Honolulu, Hawaii, April 5, 1919.

[Seal] (S.) C. W. ASHFORD,

First Judge, First Circuit Court, Territory of Hawaii. [37]

[Endorsed]: P. No. 5283. 4/244. Circuit Court, First Circuit, Territory of Hawaii. In the Matter of the Estate of James B. Castle, Late of Honolulu, Hawaii, Deceased. Order Approving Accounts, etc. Filed at 11:35 o'clock A. M., April 5, 1919. (Sgn.) B. N. Kahalepuna, Clerk. Castle & Withington. [38]

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

In the Matter of the Estate of JAMES B. CASTLE, Late of Honolulu, Deceased.

Appeal from Decree of Circuit Court.

Now come L. A. Thurston, W. R. Castle and D. L. Withington, trustees under the will of James B. Castle, and appeal to the Supreme Court from the decree of said Circuit Court entered April 5, 1919, in the above-named cause, entitled "An Order Approving Accounts, etc.," and from every portion of said decree.

Dated, Honolulu, T. H., April 8, 1919.

(Sgn.) ARTHUR WITHINGTON,

(Sgn.) MARGUERITE ASHFORD,

Attorney for L. A. Thurston, W. R. Castle and D. L. Withington, Trustees Under the Will of James B. Castle.

[Endorsed]: Original. P. No. 5383. 4/244. Circuit Court, First Circuit, Territory of Hawaii. In the Matter of the Estate of James B. Castle, Late of Honolulu, Deceased. Appeal from Decree of Circuit Court. Filed at 9:40 o'clock A. M. April 8, 1919. (Sgn.) B. N. Kahalepuna, Clerk. Arthur Withington, Margaret Ashford. [39]

Minutes of Court—March 28, 1919—Petition of Executors for Approval of Final and Supplemental Accounts, etc.

Friday, March 28th, 1919.

AT CHAMBERS—1:30 o'clock P. M.

Present:—Hon. C. W. ASHFORD, First Judge, Presiding.
J. C. CULLEN, Clerk.
H. R. JORDAN, Reporter.

P. 5383—In the Matter of the Estate of JAMES BICKNELL CASTLE, Deceased.

Petition of Executors for Approval of Final and Supplemental Accounts, etc.

Messrs. CASTLE & WITHINGTON, for the Executors.
F. M. HATCH, Esq., for Julia White Castle and Harold K. L. Castle.
HARRY IRWIN, Attorney General, for the Territory.
HENRY SMITH, Esq., Master.

Came on for hearing at this time, the petition of William R. Castle, Harold K. L. Castle and David L.

Withington, executors herein, for the approval of their final and supplemental accounts herein.

Harry Irwin, Attorney General, appearing for the Territory, makes application of the Court for the appointment of appraisers for the purpose of determining the value of the estate for inheritance tax purposes, whereupon the hearing of said matter was continued until 2 o'clock P. M., Thursday, April 3d, 1919.

The parties being ready to proceed to consider the accounts and the report of the Master thereon, and there being no objections to the same, the Court ordered that the final report and account of the executors as filed herein February 17th, 1919, together with the final and supplemental report and account as filed herein March 24th, 1919, be, and the same and each of them are hereby approved and settled, and that the method of agreement or distribution, partition and division between the widow claiming dower, on the one hand, and the trustees of the estate on the other, as set forth in the final and supplemental report of the executors filed March 24th, last, is approved, and at the appropriate time the executors may proceed to act upon and in accordance with that agreement and that method of distribution; in the mean time, there are some preliminary matters to be attended to, one of which is the payment of succession taxes or estate taxes to the United States or to the Territory or to both, provided such taxes be assessable; there is a question apparently as to whether they are or not, and the date for hearing counsel as to that has already been set. If it shall be

decided by the Court that taxes are assessable, then appraisers will probably be appointed for the purpose of making new appraisals at which the Territorial Treasurer may be represented.

Mr. Harold K. L. Castle, upon being examined by the Court, waives and renounces his right to act as a trustee under the will, and by consent of parties Mr. William R. Castle is appointed trustee in place of Mr. Harold K. L. Castle.

That being agreed to, and apparently the situation under the will, it is ordered that the renunciation of Mr. Harold K. L. Castle is accepted and Mr. William R. Castle is or will be at the appropriate time by appropriate order, appointed as one of the trustees under the will to act in his place. [40]

By consent of parties, the Master is allowed a fee of $350.00 for his services herein.

QUESTION AS TO THE WIFE'S RIGHT OF DOWER IN LIFE INSURANCE.

After argument by the respective counsel upon this point, the Court stated that there is really a good deal of law apparently to be looked up, and as there is apparently no urgent reason why a decision one way or the other should be rendered immediately, I will endeavor to give it some mature consideration unless you gentlemen shall feel perhaps that it is good posture right now to be submitted to the Supreme Court without a decision here, on the other hand, if my decision, whatever it shall be, should be unacceptable to either one of you, there will be very little trouble and expense to taking it up, there being

no evidence, and a very small record involved, but I merely make this suggestion at the end of your argument.

Judge HATCH.—I think it is all right to have your Honor's ruling.

The COURT.—I will endeavor to give you a decision at a reasonable time, and will endeavor to consult the different authorities with care.

Two insurance policies were received in evidence and marked Exhibits "A" and "C" respectively; also a Policy Loan Agreement which was marked Exhibit "B."

At 3:25 o'clock P. M. recess at Chambers.

By order of the Court:

(Sgn.) J. C. CULLEN,
Clerk. [41]

Minutes of Court—March 31, 1919—Hearing.

Monday, March 31st, 1919.

AT CHAMBERS—10 o'clock A. M.

Present:—Hon. C. W. ASHFORD, First Judge, Presiding.
J. C. CULLEN, Clerk.
H. R. JORDAN, Reporter.

P. 5383—In the Matter of the Estate of JAMES BICKNELL CASTLE, Deceased.

At 4:40 o'clock P. M. this date, the Court rendered and filed its written Opinion and Decision in regard to the widow's right of dower in life insurance policies, holding that the widow of decedent, Julia White

Castle, has such right of dower in said life insurance policies.

At 4:41 P. M. recess at Chambers.

By order of the Court:

(Sgn.) J. C. CULLEN,
Clerk. [42]

Extracts of Portions of the Policy of Life Insurance Numbered 3,656,598, Issued by the New York Life Insurance Company upon the Life of James B. Castle, Said Policy Being Designated as Exhibit "A" in a Cause Entitled in the Supreme Court of the Territory of Hawaii, "In the Matter of the Estate of James Bicknell Castle, Deceased," No. 1175.

NEW YORK LIFE INSURANCE COMPANY

Agrees to pay ——— One Hundred and Ten Thousand Dollars, to the Executors, Administrators or Assigns of the Insured, or to such Beneficiary as may have been designated in the manner herein provided, at the Home Office of the Company, in the City of New York, immediately upon receipt and approval of proofs of the death of James B. Castle, the Insured if such death shall occur before the end of the Accumulation Period of this Policy.

CHANGE OF BENEFICIARY.—The insured may change the Beneficiary at any time and from time to time, provided the Policy is not then assigned. The Insured may, however, declare the designation of any Beneficiary to be irrevocable; during the lifetime of an Irrevocably Designated Beneficiary the

Insured shall not have the right to revoke or change the designation of that Beneficiary. If any Beneficiary or Irrevocably Designated Beneficiary dies before the Insured, the interest of such Beneficiary shall vest in the Insured. Every change, designation or declaration must be made by written notice to the Company at the Home Office, accompanied by the Policy, and will take effect only when endorsed on this Policy by the Company.

GENERAL PROVISIONS.—(1) Only the President, a Vice-President, a Secretary, or the Treasurer has power on behalf of the Company to make or modify this or any contract or Insurance or to extend the time for paying any premium, and the Company shall not be bound by any promise or representation heretofore or hereafter made, unless made in writing by one of said officers. (2) Premiums must be paid at the Home Office, unless otherwise provided, and, in any case, in exchange for an official receipt signed by one of the above-named officers and countersigned by the person to whom payment is made. (3) If the age of the Insured is incorrectly stated, the amount payable under this Policy shall be the Insurance which the actual premium paid would have purchased at the true age of the Insured. (4) In an apportionment or distribution of Profits, the principles and methods which may be adopted by the Company for such apportionment or distribution and its determination of the amount equitably belonging to this Policy shall be conclusive upon the Insured and upon all parties having or claiming any interest under this Policy. (5) Any indebtedness

to the Company will be deducted in any settlement of this Policy or of any benefit hereunder. (6) Any assignment of this Policy must be made in duplicate and both sent to the Home Office, one to be retained by the Company and the other to be returned. The Company has no responsibility for the validity of any assignment. (7) The insured may, without the consent of the Beneficiary, receive every benefit, exercise every right and enjoy every privilege conferred upon the Insured by this Policy. [43]

Opinion.

In the Supreme Court of the Territory of Hawaii.

OCTOBER TERM, 1918.

IN THE MATTER OF THE ESTATE OF JAMES B. CASTLE, DECEASED.

No. 1175.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

HON. C. W. ASHFORD, JUDGE.

Argued June 17, 1919. Decided July 5, 1919.

COKE, C. J., KEMP and EDINGS, JJ.

Dower.

Under Sec. 2977, R. L. 1915, the widow is entitled to one-third part of the movable effects in possession or reducible to possession of her husband at the time of his death after the payment of his just debts.

Same.

The term "movable effects in possession or reducible to possession" is less comprehensive than the phrase "personal property."

Same—life insurance.

The proceeds of policies of insurance upon the life of the husband which were made payable to his executors, administrators or assigns and collected by them subsequently to his death were not his movable effects in possession or reducible to possession at the time of his death and the widow possess no dower right therein. [44]

OPINION OF THE COURT BY COKE, C. J.

James B. Castle died at Honolulu in the year 1918 and left an estate of the value of about $600,000, which was disposed of by the will of the deceased which was duly admitted to probate. The deceased carried insurance policies payable to his executors, administrators or assigns and from which the executors received the sum of $53,870. By the provisions of the policies of insurance the insured reserved the right to change the beneficiary at any time provided the policy was not then assigned. The deceased left surviving him a widow, Julia White Castle, and his son, Harold K. L. Castle, both of whom were provided for in the will. Mrs. Castle, the widow, waived her rights under the will and elected to take her dower right as provided by statute, and property of the value of $181,250 was assigned to her. Upon the hearing of the final accounts of the executors of the will the Circuit Court ordered one-third of the aggre-

gate net amount collected by the executors upon the policies of life insurance carried by the deceased paid to the widow as part of her dower.

The question involved is whether a widow is entitled by way of dower to any part of the proceeds of an insurance policy upon the life of her deceased husband payable to his executors, administrators or assigns. To determine this question it is necessary to construe the meaning and intent of section 2977, R. L. 1915 which is as follows:

> "Every woman shall be endowed of one-third part of all the lands owned by her husband at any time during marriage, in fee simple, in freehold, or for the term of fifty years or more, so long as twenty-five years of the term remain unexpired, but in no less estate, unless she is lawfully barred thereof; she shall also be entitled, by way of dower, to an absolute property in the one-third part of all his movable effects, in possession, or reducible to possession, at the time of his death, after the payment of all his just debts." [45]

The common-law right of dower entitled the wife to a life estate in one-third of all the lands and tenements of which the husband was seized of an estate of inheritance at any time during coverture. It is to be noted that by the provision of our statute the right of the widow has been extended beyond the common law to the extent that she acquires an absolute property in one-third of her husband's movable effects in possession or reducible to possession at the time of his death after the payment of his just debts.

The appellee argues that the term "movable effects in possession or reducible to possession," as the term is used in the statute, is equivalent to "personal property." Property is grouped into two general classes, to wit, personal property and real property and if the contention of appellee is sound the conclusion necessarily follows that a widow is entitled by way of dower to an interest in all of the real and personal property of her deceased husband. The statute in our opinion does not extend that far. In a prior decision of this court it is clearly indicated that in some classes of personalty the widow enjoys no dower interest. In Trustees Ena Estate v. Ena, 18 Haw. 588, the following language is employed: "Debts of a solvent estate should be paid from cash, but if that is insufficient the personalty in which the widow has no dower interest should be sold first." And again in the same opinion: "The widow's dower in the movable effects of her husband is subject to the payment of all of his just debts, provided the cash and nondowable personalty are insufficient." A contract of life insurance is a mutual agreement by which one party undertakes to pay a given sum upon the happening of a particular event contingent upon the duration of human life in consideration of the payment of a smaller sum immediately or [46] in periodical payments. The right to the amount due upon the policy does not come into existence until after the death of the insured. The money belongs to the insurer who is charged with the duty created by the contract to pay the beneficiaries. The only thing which the insured can grant is an interest in the con-

tract. See Taylor v. Treasurer and Receiver General, 115 N. E. 300. In re Estate of Alexandre, 19 Haw. 551, the question reserved was whether the proceeds of a contract of insurance in a mutual benefit association which the deceased prior to his death had directed should be paid to the executor of his will for the benefit of the estate were part of the estate of the deceased and whether the widow had a dower interest therein, etc., and the Court held that the widow was only entitled to dower in the movable effects in possession or reducible to possession and that the money in question was not personal property of the deceased nor a part of his movable effects in possession or reducible to possession, for which reason the widow was excluded from any right therein. An early and well considered case upon this subject is Strong v. White, 19 Conn. 238. The question there involved was whether where a testator bequeathed to his son all his movable property that he should die possessed of included a judgment debt which existed in favor of the testator at the time of his death. In that opinion the Court says: "The adjective 'movable' applied to property signifies in its ordinary and proper sense that which is capable of being moved or put out of one place into another. It therefore necessarily implies that such property has an actual locality and is susceptible of locomotion or a change of place. * * * It is however insisted that the word 'movable' applied as an epithet to property is equivalent to the word 'personal,' and in support of this claim we are referred to Blackstone. This position, however, so far from being [47] supported,

is discountenanced by that writer. * * * He did not deem the phrases 'movable property' and 'personal property' to be equivalent, but on the contrary considered movable property to be only one of the several species of personal property." See, also, 2 Bouvier's Law Dict. 2266 and Sullivan v. Richardson, 14 So. 692, 709.

We think it is plain that the proceeds of the policies of insurance upon the life of Mr. Castle which were made payable to his executors, administrators or assigns and collected by them subsequently to his death, were not his movable effects in possession or reducible to possession at the time of his death and that the widow possesses no dower right therein.

The order appealed from is reversed and the cause remanded to the Court below for proceedings consistent with this opinion.

A. WITHINGTON (Marguerite Ashford With Him on the Brief), for the Appellants.

F. M. HATCH, for the Appellee.

JAMES L. COKE.
S. B. KEMP.
W. S. EDINGS.

[Endorsed]: No. 1175. Supreme Court, Territory of Hawaii. October Term, 1918. In the Matter of the Estate of James B. Castle, Deceased. Opinion. Filed July 5, 1919, at 9:10 A. M. J. A. Thompson, Clerk. [48]

In the Supreme Court of the Territory of Hawaii.

October Term, 1919.

No. 1175.

In the Matter of the Estate of JAMES B. CASTLE,
Late of Honolulu, Deceased.

Decree on Appeal.

In the above-entitled cause, pursuant to the opinion of the above-entitled court filed on the 5th day of July, 1919, the order appealed from is reversed and the cause is remanded to the Court below for proceedings consistent with said opinion.

Dated, Honolulu, T. H., July 9, 1919.

By the Court:

J. A. THOMPSON,
Clerk Supreme Court.

[Endorsed]: Original—No. 1175. Supreme Court, Territory of Hawaii. In the Matter of the Estate of James B. Castle, Late of Honolulu, Deceased. Decree on Appeal. Filed July 9, 1919, at 2:08 P. M. J. A. Thompson, Clerk. Castle & Withington. [49]

In the Supreme Court of the Territory of Hawaii.

June Term, 1919.

#1175.

In the Matter of the Estate of JAMES BICKNELL CASTLE, Deceased.

MATTER OF APPEAL BY TRUSTEES AS TO WIDOW'S RIGHT OF DOWER IN PROCEEDS OF LIFE INSURANCE POLICIES.

Exceptions and Notice of Appeal.

Now comes Julia White Castle, respondent in the above-entitled matter, and excepts to the ruling and decree of the Supreme Court of the Territory of Hawaii, which decree was filed on the 9th day of July, 1919, denying to said Julia White Castle the right to share by way of dower in the proceeds of certain life insurance policies which sum is now in court for distribution, and gives notice of an appeal to the Circuit Court of Appeals of the United States for the Ninth Circuit, from said decree.

Dated: Honolulu, July 10, 1919.

F. M. HATCH,
Attorney for Julia White Castle.

[Endorsed]: No. 1175. In the Supreme Court, Territory of Hawaii. June Term, 1919. In the Matter of the Estate of James Bicknell Castle, Deceased. Exception and Notice of Appeal to U. S. Court of Appeals, Ninth Circuit. F. M. Hatch, Atty. for Julia White Castle. Filed July 10, 1919, at 3:36 P. M. J. A. Thompson, Clerk. [50]

In the Supreme Court of the Territory of Hawaii.

No. 1175.

In the Matter of the Estate of JAMES BICKNELL CASTLE, Deceased,

JULIA WHITE CASTLE,

Plaintiff in Error,

vs.

WILLIAM R. CASTLE, LORRIN A. THURSTON, and ALFRED L. CASTLE, the Trustees Under the Will of Said JAMES BICKNELL CASTLE, Deceased,

Defendants in Error.

Petition for Writ of Error from the United States Circuit Court of Appeals for the Ninth Circuit to the Supreme Court of the Territory of Hawaii.

To the Honorable JAMES L. COKE, Chief Justice of the Supreme Court of the Territory of Hawaii:

Julia White Castle, plaintiff in error in the above-entitled cause, feeling herself aggrieved by the decision and judgment in said cause entered by said Supreme Court of the Territory of Hawaii on the 9th day of July, 1919, and complaining says:

That there is manifest error, to the damage of the petitioner in the same, which errors are specifically set forth in the assignment of errors filed herewith, to which reference is hereby made; that the amount involved in said suit, exclusive of costs, exceeds the sum or value of Five Thousand Dollars ($5,000.00),

and that it is a proper case to be reviewed by said Circuit Court of Appeals; and therefore your petitioner would respectfully pray that a Writ of Error be allowed to her in the above-entitled cause and that she be allowed to prosecute the same to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided; that an order be made fixing the amount of security which the [51] petitioner shall give and furnish upon said Writ of Error, and that, upon the giving of such security, all further proceedings in this court so far as the distribution of the sums of money received by the executors of the said will from the proceeds of certain life insurance policies is concerned be suspended and stayed until the determination of said Writ of Error by the United States Court of Appeals for the Ninth Circuit; and that the clerk of the Supreme Court of the Territory of Hawaii be directed to send to the United States Circuit Court of Appeals for the Ninth Circuit a transcript of the record, proceedings and papers in this cause, duly authenticated, for the correction of the errors so complained of and that a citation and supersedeas may issue.

And your petitioner will ever pray.

JULIA WHITE CASTLE.
By Her Attorney:
FRANCIS M. HATCH,
Petitioner.

Dated at Honolulu, H. T., this 8th day of January, A. D. 1920.

Subscribed and sworn to before me this 8th day of January, A. D. 1920.

[Seal] J. A. THOMPSON,
Clerk Supreme Court.

[Endorsed]: No. 1175. In the Supreme Court of the Territory of Hawaii. In the Matter of the Estate of James Bicknell Castle, Deceased. Julia White Castle, Plaintiff in Error, vs. William R. Castle, Lorrin A. Thurston, and Alfred L. Castle, Trustees Under the Will of James Bicknell Castle, Defendants in Error. Petition for Writ of Error. Filed January 8, 1920, at 11:50 A. M. J. A. Thompson, Clerk. [52]

In the Supreme Court of the Territory of Hawaii.

In the Matter of the Estate of JAMES BICKNELL CASTLE, Deceased.

JULIA WHITE CASTLE,
Plaintiff in Error,

vs.

WILLIAM R. CASTLE, LORRIN A. THURSTON and ALFRED L. CASTLE, Trustees Under the Will of JAMES BICKNELL CASTLE, Deceased,
Defendants in Error.

Affidavit of Value.

Territory of Hawaii,
City and County of Honolulu.

Francis M. Hatch, of the City and County of Honolulu, Territory of Hawaii, being duly sworn, doth depose and say:

That he is attorney in fact of Julia White Castle, plaintiff in error in the above-entitled cause; that in the controversy between said Julia White Castle, plaintiff in error, against William R. Castle and others, trustees under the will of James Bicknell Castle, deceased, defendants in error, there is involved more than the sum of Five Thousand Dollars ($5,000.00), exclusive of costs, to wit, said Julia White Castle, plaintiff in error claims to be entitled to the sum of Seventeen Thousand Nine Hundred and Fifty-six 66/100 Dollars ($17,956.66), which money is now under the control of the Court in the above-entitled cause, and which is the sum actually in dispute between the parties above named; and further deponent sayeth not.

FRANCIS M. HATCH.

Subscribed and sworn to before me this 8th day of January, A. D. 1920.

[Seal] J. A. THOMPSON,
Clerk.

[Endorsed]: No. 1175. In the Supreme Court of the Territory of Hawaii. In the Matter of the Estate of James Bicknell Castle, Deceased, Julia White Castle, Plaintiff in Error, vs. William R. Castle, Lorrin A. Thurston, and Alfred L. Castle, Trustees Under the Will of James Bicknell Castle, Deceased, Defendants in Error. Affidavit of Value. Filed January 8, 1920, at 11:50 A. M. J. A. Thompson, Clerk. [53]

In the Supreme Court of the Territory of Hawaii.

No. 1175.

In the Matter of the Estate of JAMES BICKNELL CASTLE, Deceased,

JULIA WHITE CASTLE,

Plaintiff in Error,

vs.

WILLIAM R. CASTLE, LORRIN A. THURSTON and ALFRED L. CASTLE, the Trustees Under the Will of Said JAMES BICKNELL CASTLE, Deceased,

Defendants in Error.

Assignment of Errors.

Now comes the above-named plaintiff, Julia White Castle, and says that in the records and proceedings in the above-entitled cause there is manifest error in this, to wit:

I.

That the Supreme Court of the Territory of Hawaii erred in ordering and rendering judgment that this plaintiff in error was and is not entitled to share by way of dower, under the laws of the Territory of Hawaii, in the proceeds of certain policies of life insurance which had been taken out by the said James Bicknell Castle in his lifetime and made payable to his executors or administrators upon his decease.

II.

That the said Supreme Court of the Territory of Hawaii erred in entering judgment against said Julia White Castle on her petition for the assignment to her of one-third (⅓) of the [54] proceeds of said policies of life insurance which had been collected by the executors and trustees named under the Will of said James Bicknell Castle and which sum was, at the time of the application of said Julia White Castle, in court and subject to the disposition of the Court as part of the estate of said James Bicknell Castle, deceased.

Dated at Honolulu, H. T., this 8th day of January, A. D. 1920.

JULIA WHITE CASTLE,
By Her Attorney:
FRANCIS M. HATCH. [55]

[Endorsed:] No. 1175. In the Supreme Court of the Territory of Hawaii. In the Matter of the Estate of James Bicknell Castle, Deceased, Julia White Castle, Plaintiff in Error, vs. William R. Castle, Lorrin A. Thurston, and Alfred L. Castle, Trustees under the Will of James Bicknell Castle, Deceased, Defendants in Error. Assignment of Errors. Filed January 8, 1920, at 11:50 A. M. J. A. Thompson, Clerk. [56]

In the Supreme Court of the Territory of Hawaii.

No. 1175.

In the Matter of the Estate of JAMES BICKNELL CASTLE, Deceased,

JULIA WHITE CASTLE,

Plaintiff in Error,

vs.

WILLIAM R. CASTLE, LORRIN A. THURSTON and ALFRED L. CASTLE, Trustees Under the Will of Said JAMES BICKNELL CASTLE, Deceased,

Defendants in Error.

Order Allowing Writ of Error Returnable to United States Circuit Court of Appeals, Ninth Circuit, and Supersedeas.

Upon reading and filing the foregoing petition for a writ of error, together with an assignment of errors presented therewith alleged to have occurred in the judgment of the Court and in the proceedings in the trial of said cause prior thereto;

It is ORDERED that a writ of error be and the same is hereby allowed to the said Julia White Castle to have reviewed by the Circuit Court of Appeals of the United States for the Ninth Circuit the judgment heretofore entered in the above-entitled cause, and the proceedings in the trial of said cause prior thereto; and that the amount of bond on said writ of error be and the same is hereby fixed in the sum

of Five Hundred Dollars ($500.00), and that upon the filing by said above-named plaintiff in error of an approved bond in said amount all further proceedings in said cause in the Supreme Court of the Territory of Hawaii and in the Circuit Court of the First Judicial Circuit in said Territory of [57] Hawaii, so far as the proceeds of certain policies of life insurance named in said proceedings is concerned, be stayed and suspended until the determination of said writ of error by the said United States Circuit Court of Appeals for the Ninth Circuit.

Dated at Honolulu, H. T., this 8th day of January, A. D. 1920.

[Seal] JAMES L. COKE,
Chief Justice, Supreme Court, Territory of Hawaii.

[Endorsed]: No. 1175. In the Supreme Court of the Territory of Hawaii. In the Matter of the Estate of James Bicknell Castle, Deceased, Julia White Castle, Plaintiff in Error, vs. William R. Castle, Lorrin A. Thurston, and Alfred L. Castle, Trustees Under the Will of James Bicknell Castle, Deceased, Defendants in Error. Order Allowing Writ of Error. Filed January 8, 1920, at 11:50 A. M. J. A. Thompson, Clerk. [58]

In the Supreme Court of the Territory of Hawaii.

In the Matter of the Estate of JAMES BICKNELL CASTLE, Deceased,

JULIA WHITE CASTLE,

Plaintiff in Error,

vs.

WILLIAM R. CASTLE, LORRIN A. THURSTON and ALFRED L. CASTLE, Trustees Under the Will of JAMES BICKNELL CASTLE, Deceased,

Defendants in Error.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that Julia White Castle, of Honolulu, Territory of Hawaii, as principal, and ~~John~~ C. R. C. R. H. Hemenway, ~~Waterhouse,~~ of said Honolulu, as surety, are held and firmly bound unto William R. Castle, Lorrin A. Thurston and Alfred L. Castle, Trustees under the Will of James Bicknell Castle, deceased, in the sum of Five Hundred Dollars ($500.00), to the payment whereof well and truly to be made we bind ourselves and our respective heirs, executors and administrators firmly by these presents.

The condition of the above obligation is such that, whereas on the 8th day of January, 1920, the above-bonded principal sued out a Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit from a certain judgment made and entered

in the above-entitled court and cause on the 9th day of July, 1919, by the Supreme Court of the Territory of Hawaii.

NOW, THEREFORE, if the said principal shall prosecute her said writ of error to effect, and shall answer all damages and costs if she fails to sustain her said writ of error, then this obligation shall be void; otherwise in full force and effect. [59]

IN WITNESS WHEREOF, the said C. R. C. R. H. Julia White Castle, principal, and ~~John~~ Hemenway, ~~Waterhouse,~~ surety, have hereunto set their hands and seals this 8th day of January, A. D. 1920.

JULIA WHITE CASTLE.
By Her Attorney in Fact:
FRANCIS. M. HATCH. (Seal)
C. R. HEMENWAY. (Seal)

The foregoing bond is approved. Honolulu, H. T., January 8, 1920.

[Seal] JAMES L. COKE,
Chief Justice of the Supreme Court, for the Territory of Hawaii.

[Endorsed]: No. 1175. In the Supreme Court of the Territory of Hawaii. In the Matter of the Estate of James Bicknell Castle, Deceased, Julia White Castle, Plaintiff in Error, vs. William R. Castle, Lorrin A. Thurston, and Alfred L. Castle, Trustees Under the Will of James Bicknell Castle, Deceased, Defendants in Error. Bond on Writ of Error. Filed January 8, 1920, at 11:50 A. M. J. A. Thompson, Clerk. [60]

In the Supreme Court of the Territory of Hawaii.

In the Matter of the Estate of JAMES BICKNELL CASTLE, Deceased.

JULIA WHITE CASTLE,

Plaintiff in Error,

vs.

WILLIAM R. CASTLE, LORRIN A. THURSTON and ALFRED L. CASTLE, Trustees Under the Will of JAMES BICKNELL CASTLE, Deceased,

Defendants in Error.

Writ of Error.

United States of America,—ss.

The President of the United States of America, to the Honorable the Judges of the Supreme Court of the Territory of Hawaii, GREETING:

Because in the record and in the proceedings, as also in the rendition of judgment in said Supreme Court of the Territory of Hawaii before you, in the case of Julia White Castle, Plaintiff, vs. The Trustees Under the Will of James Bicknell Castle, Deceased, Defendants, a manifest error has happened, to the great prejudice and damage of said Julia White Castle, petitioner and plaintiff, as is said and appears by the petition herein,—

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do com-

mand you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justices of the United States Circuit Court of Appeals for the Ninth Circuit, in the City of San Francisco, in [61] the State of California, together with this Writ, so as to have the same at the said place in said Circuit Court thirty days after this date, and the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein, to correct those errors what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 8th day of January, A. D. 1920.

Attest my hand and the seal of the Supreme Court of the Territory of Hawaii, at the Clerk's Office, Honolulu, Territory of Hawaii, on the day and year last above written.

[Seal] J. A. THOMPSON,
Clerk Supreme Court, Territory of Hawaii.

Allowed this 8th day of January, A. D. 1920.

[Seal] JAMES L. COKE,
Chief Justice of the Supreme Court of the Territory of Hawaii. [62]

[Endorsed:] No. 1175. In the Supreme Court of the Territory of Hawaii. In the Matter of the Estate of James Bicknell Castle, Deceased, Julia White Castle, Plaintiff in Error, vs. William R. Castle, Lor-

rin A. Thurston, and Alfred L. Castle, Trustees under the Will of James Bicknell Castle, Deceased, Defendants in Error. Writ of Error. Filed January 8, 1920, at 11:50 A. M. J. A. Thompson, Clerk. [63]

In the Supreme Court of the Territory of Hawaii.

In the Matter of the Estate of JAMES BICKNELL CASTLE, Deceased.

JULIA WHITE CASTLE,

Plaintiff in Error,

vs.

WILLIAM R. CASTLE, LORRIN A. THURSTON and ALFRED L. CASTLE, Trustees Under the Will of JAMES BICKNELL CASTLE, Deceased,

Defendants in Error.

Citation on Writ of Error.

United States of America,—ss.

The President of the United States of America, to William R. Castle, Lorrin A. Thurston and Alfred L. Castle, Trustees Under the Will of James Bicknell Castle, Deceased, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, State of California, within thirty days from the date of this Writ, pursuant to a Writ of Error filed in the clerk's office of the Supreme Court of the Territory of Hawaii, wherein Julia White

Castle is plaintiff in error, and you, said trustees, are defendants in error, to show cause, if any there may be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States of America, this 8th day of January, A. D. 1920.

[Seal] JAMES L. COKE,
Chief Justice of the Supreme Court of the Territory of Hawaii.

Honolulu, Jan. 8, 1920.

Service of within writ accepted on date above written.

ARTHUR WITHINGTON,
Attorney for William R. Castle, Lorrin A. Thurston and Alfred L. Castle, Defendants in Error. [64]

[Endorsed:] No. 1175. In the Supreme Court of the Territory of Hawaii. In the Matter of the Estate of James Bicknell Castle, Deceased, Julia White Castle, Plaintiff in Error, vs. William R. Castle, Lorrin A. Thurston, and Alfred L. Castle, Trustees under the Will of James Bicknell Castle, deceased, Defendants in Error. Citation on Writ of Error. Filed and issued for service January 8, 1920, at 11:50 A. M. J. A. Thompson, Clerk. Returned January 8, 1920, at 3:10 P. M. J. A. Thompson, Clerk. [66]

In the Supreme Court of the Territory of Hawaii.

In the Matter of the Estate of JAMES BICKNELL CASTLE.

JULIA WHITE CASTLE,

Plaintiff in Error,

vs.

WILLIAM R. CASTLE, LORRIN A. THURSTON and ALFRED L. CASTLE, Trustees,

Defendants in Error.

Praecipe for Transcript of Record on Writ of Error.

To James A. Thompson, Esquire, Clerk of the Supreme Court for the Territory of Hawaii:

You will please prepare a transcript of a record in the above-entitled cause, to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and include in said transcript the following pleadings, opinions, judgments and papers on file in said cause, to wit:

No. 1175—Estate of J. B. CASTLE.

1. Last Will and Testament of James B. Castle, dated September 13, 1907, and Codicil thereto, dated August 19, 1912.
2. Election of Julia White Castle, widow, to take dower, dated July 12, 1918.
3. Petition by the executors for allowance of accounts, determining trust and distributing estate, and attached thereto are the Schedules of Accounts, marked Schedules "A," "B" and

"C," and a summary showing the remainder of the property belonging to the estate, marked Exhibit "E," filed February 17, 1919. [67]

4. Supplemental final account, filed March 24, 1919.
5. Order approving accounts, etc., dated and filed April 5, 1919, Judge Ashford's opinion.
6. Appeal by the trustees from the decree of the Circuit Court, dated and filed April 8, 1919.
7. Minutes of the Circuit Court, First Circuit, under dates, to wit: March 28 and 31, 1919.
8. Extracts of portions of the Policy of Life Insurance numbered 3,656,598, issued by the New York Life Insurance Company upon the life of James B. Castle, said Policy being designated as Exhibit "A" on file in the above cause (portions indicated, introductory portion and "General Provisions").
9. Opinion of the Supreme Court of the Territory of Hawaii, rendered and filed July, 5, 1919.
10. Decree of the Supreme Court of the Territory of Hawaii, entered and filed July 9, 1919.
11. Exceptions and notice of appeal by Julia White Castle to the Circuit Court of Appeals of the United States for the Ninth Circuit, dated and filed July 10, 1919.
12. Petition for Writ of Error from the United States Circuit Court of Appeals for the Ninth Circuit to the Supreme Court of the Territory of Hawaii, dated and filed January 8, 1920.
13. Affidavit of value by Francis M. Hatch, dated and filed January 8, 1920.

14. Assignment of errors, dated and filed January 8, 1920.
15. Order allowing writ of error returnable to United States Circuit Court of Appeals for the Ninth Circuit, and supersedeas, dated and filed January 8, 1920.
16. Bond on writ of error, dated and filed January 8, 1920.
17. Writ of error, dated and filed January 8, 1920.
18. Citation on writ of error, with return of service, dated and filed January 8, 1920. [68]
19. Section 4, Article 1, Chapter 4, Second Act Kamehameha 3d, 1846.

You will please annex and transmit with the record the original writ of error from the United States Circuit Court of Appeals for the Ninth Circuit, and original Citation with return of service, your return of the writ of error under the seal of the Supreme Court of the Territory of Hawaii, and also your certificate under seal stating in detail the cost of the record and by whom paid.

Dated Honolulu, T. H., January 8, 1920.

F. M. HATCH,
Attorney for Julia White Castle,
Plaintiff in Error.

[Endorsement]: No. 1175. In the Supreme Court of the Territory of Hawaii. In the Matter of the Estate of James Bicknell Castle. Julia White Castle, Plaintiff in Error, vs. William R. Castle, Lorrin A. Thurston, and Alfred L. Castle, Defendants in Error, Praecipe to the Clerk. Filed January 8, 1920, at

3:22 P. M. J. A. Thompson, Clerk. F. M. Hatch, Atty. for Plaintiff in Error. Honolulu, Hawaii, [69]

Copy of Section IV of Article I of Chapter IV, Second Act of Kamehameha III, Statutes of 1846.

"Section IV. The wife, whether married in pursuance of this article or heretofore, or whether validly married in this kingdom or in some other country, and residing in this, shall be deemed for all civil purposes, to be merged in her husband, and civilly dead. She shall not, without his consent, unless otherwise stipulated by anterior contract, have legal power to make contracts, or to alienate and dispose of property—she shall not be civilly responsible in any court of justice, without joining her husband in the suit, and she shall in no case be liable to imprisonment in a civil action. The husband shall be personally responsible in damages, for all the tortuous acts of his wife, for assaults, for slanders, for libels and for consequential injuries done by her to any person or persons in this kingdom. The wife shall in virtue of her marriage, be entitled in law to receive upon the death of her husband, by way of dower, a life estate in one-third part of all immoveable and fixed property owned by him at the time of her intermarriage, or acquired by him during her marriage; and an absolute property in the one-third part of all his moveable effects in possession or reduceable to possession at the time of his death, after the payment of all his just

debts; Provided, that the wife may voluntarily as hereinafter specified, renounce in writing, her dower in any of the immoveable and fixed property of her husband, sold by him for a valuable and satisfactory consideration. Without which free and unconstrained renunciation in writing, she shall, notwithstanding such sale by her husband, be entitled to demand and receive her dower of the purchaser or holder, at the time of her widowhood." [70]

In the Supreme Court of the Territory of Hawaii.
October Term, 1919.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

In the Matter of the Estate of JAMES BICKNELL CASTLE, Deceased.

Certificate of Clerk to Transcript of Record and Return to Writ of Error.

Territory of Hawaii,
City and County of Honolulu,—ss.

I, James A. Thompson, Clerk of the Supreme Court of the Territory of Hawaii, by virtue of the foregoing writ of error, dated and filed January 8, 1920, and in obedience thereto, the original of which said writ of error is herewith returned, being pages 61 to 63, both inclusive, of the foregoing transcript of record, and in pursuance to the praecipe dated and filed January 8, 1920, to me directed, a copy whereof is hereto

attached, being pages 67 to 69, both inclusive, DO HEREBY TRANSMIT to the Honorable United States Circuit Court of Appeals for the Ninth Circuit the foregoing transcript of record, being pages 1 to 42, both inclusive, pages 44 to 53, both inclusive, and pages 57 to 60, both inclusive, and I DO HEREBY CERTIFY the same to be true, full and correct copies of the pleadings, record, proceedings, opinions and final decree which are now on file and of record in the office of the clerk of the Supreme Court of the Territory of Hawaii in the case entitled in said court, "In the Matter of the Estate of James Bicknell Castle, Deceased," Number 1175.

I FURTHER CERTIFY that page 43 of the foregoing transcript of record is a full, true and correct abstract of portions of the Policy of Life Insurance Numbered 5,656,598, issued by the New York Life Insurance Company upon the life of James B. Castle, said [71] policy being designated as Exhibit "A" in the above cause.

I DO FURTHER CERTIFY that the original assignment of errors, dated and filed January 8, 1920, being pages 54 to 56, both inclusive, and the original citation on writ of error, dated and filed January 8, 1920, with the acceptance of service thereof, being pages 64 to 66, both inclusive, of the foregoing transcript, are hereto attached and herewith returned.

I DO FURTHER CERTIFY that page 70 of the foregoing transcript is a true and faithful copy of Section IV of Article I of Chapter IV of the Second

Act of Kamehameha III, Statute Laws, 1846, at page 59, under the Title, to wit: "ARTICLE I.—OF THE MARRIAGE CONTRACT."

I LASTLY CERTIFY that the cost of the foregoing transcript of record is $32.55, and that said amount has been paid by Francis M. Hatch, Esq., attorney for Julia White Castle, the plaintiff in error herein.

IN TESTIMONY WHEREOF I have hereunto set my hand and the seal of the Supreme Court of the Territory of Hawaii, at Honolulu, City and County of Honolulu, this 19th day of January, A. D. 1920.

[Seal] JAMES A. THOMPSON,
Clerk of the Supreme Court of the Territory of Hawaii. [72]

[Endorsed]: No. 3443. United States Circuit Court of Appeals for the Ninth Circuit. Julia White Castle, Plaintiff in Error, vs. William R. Castle, Lorrin A. Thurston and Alfred L. Castle, Trustees Under the Will of James Bicknell Castle, Deceased, Defendants in Error. Transcript of Record. Upon Writ of Error to the Supreme Court of the Territory of Hawaii.

Filed January 28, 1920.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the Supreme Court of the Territory of Hawaii.

No. 1175.

In the Matter of the Estate of JAMES BICKNELL CASTLE, Deceased.

JULIA WHITE CASTLE,

Plaintiff in Error,

vs.

WILLIAM R. CASTLE, LORRIN A. THURSTON and ALFRED L. CASTLE, the Trustees Under the Will of JAMES BICKNELL CASTLE, Deceased,

Defendants in Error.

Stipulation of Facts Admitted on Writ of Error.

It is stipulated that on any appeal or writ of error taken to obtain a review of the decision and judgment of the above-entitled court in the above-entitled cause, a transcript of the testimony and exhibits in said cause need not be taken up, but that on any such appeal or writ of error the following facts, among others, shall be considered as established by said testimony and exhibits:

1. James Bicknell Castle, late of Honolulu in the Territory of Hawaii, died on April 5th, 1918, leaving estate in said Territory and a will;

2. That under said will, which was duly admitted to probate on May 18th, 1918, David L. Withington, William R. Castle and Harold K. L. Castle were appointed executors of the same; and thereafter on the

settlement of accounts of said executors said David L. Withington, William R. Castle and Lorrin A. Thurston were appointed trustees under said will. And that subsequently, during the pendency of the proceedings as to said estate, said David L. Withington having died, Alfred L. Castle was appointed trustee under said will in his place; that the assets of the estate of said James Bicknell Castle are now in the control of said trustees, to wit, William R. Castle, Lorrin A. Thurston and Alfred L. Castle; except the sum of $18,302.73, claimed by the widow, Julia White Castle—the plaintiff in error—from proceeds of life insurance policies, which is held by the executors to be disposed of on the Court's order as to the widow's right of dower;

3. That on February 17th, 1919, said executors filed an account showing the collection by them, among other amounts, of the sum of Fifty-four Thousand, Nine Hundred Eight and 19/100 Dollars ($54,908.19), the proceeds of certain policies of life insurance in New York companies, taken out by said James Bicknell Castle in his lifetime, made payable upon his death to his executors, administrators or assigns;

4. That said amount of $54,908.19 was in fact collected by said executors after the decease of said James Bicknell Castle, to wit, in June and July, 1918; that on the date last named all of the debts of said James Bicknell Castle had been paid, but no part of said sum of $54,908.19 had ever been in actual physical possession of said James Bicknell Castle, or of his said widow Julia White Castle;

5. That said Julia White Castle duly renounced the provisions made in her favor in the will of her said husband, and elected to take in lieu thereof her right of dower and other statutory rights under the laws of the Territory of Hawaii;

6. That at the time of the settlement of the accounts of said executors upon the claim of said widow to be allowed one-third part of the said sum of $54,908.19, proceeds of said policies of life insurance as above set out, the judge of the Circuit Court of the First Judicial Circuit having jurisdiction of said cause allowed to said widow one-third, to wit: $18,302.73 as distributive share by way of dower under Hawaiian statute; that upon appeal to the Supreme Court of the Territory of Hawaii, said decision of said Judge was reversed, and it was held that his widow had no dower right in said amount;

7. That said life insurance policies, amongst other clauses, contained the following provisions:

NEW YORK LIFE INSURANCE COMPANY

Agrees to pay ——— One Hundred and Ten Thousand Dollars, to the Executors, Administrators or Assigns of the Insured, or to such Beneficiary as may have been designated in the manner herein provided, at the Home Office of the Company, in the City of New York, immediately upon receipt and approval of proofs of the death of JAMES B. CASTLE, the Insured if such death shall occur before the end of the Accumulation Period of this Policy.

CHANGE OF BENEFICIARY.—The insured may change the Beneficiary at any time and from time

to time, provided the Policy is not then assigned. The insured may, however, declare the designation of any Beneficiary to be irrevocable; during the lifetime of an Irrevocably Designated Beneficiary the Insured shall not have the right to revoke or change the designation of that Beneficiary. If any Beneficiary or Irrevocably Designated Beneficiary dies before the Insured, the interest of such Beneficiary shall vest in the Insured. Every change, designation or declaration must be made by written notice to the Company at the Home Office, accompanied by the Policy, and will take effect only when endorsed on this Policy by the Company.

GENERAL PROVISIONS.—(1) Only the President, a Vice-President, a Secretary, or the Treasurer has power on behalf of the Company to make or modify this or any contract of Insurance or to extend the time for paying any premium, and the Company shall not be bound by any promise or representation heretofore or hereafter made, unless made in writing by one of said officers. (2) Premiums must be paid at the Home Office, unless otherwise provided, and, in any case, in exchange for an official receipt signed by one of the above-named officers and countersigned by the person to whom payment is made. (3) If the age of the Insured is incorrectly stated, the amount payable under this Policy shall be the Insurance which the actual premium paid would have purchased at the true age of the Insured. (4) In an apportionment or distribution of Profits, the principles and methods which may be adopted by the Com-

pany for such apportionment or distribution and its determination of the amount equitably belonging to this Policy shall be conclusive upon the Insured and upon all parties having or claiming any interest under this policy. (5) Any indebtedness to the Company will be deducted in any settlement of this Policy or of any benefit hereunder. (6) Any assignment of this Policy must be made in duplicate and both sent to the Home Office, one to be retained by the Company and the other to be returned. The Company has no responsibility for the validity of any assignment. (7) The Insured may, without the consent of the Beneficiary, receive every benefit, exercise every right and enjoy every privilege conferred upon the Insured by this Policy.

Honolulu, January 21st, 1920.

FRANCIS M. HATCH,
Attorney for Julia White Castle,
Plaintiff in Error.

ARTHUR WITHINGTON,
Attorney for William R. Castle, Lorrin A. Thurston and Alfred L. Castle, the Trustees Under the Will of James Bicknell Castle, Deceased,
Defendants in Error.

The clerk may file the foregoing stipulation, January 30th, 1920.

JAMES L. COKE,
Chief Justice of the Supreme Court.

[Endorsed]: No. 1075. In the Supreme Court, Territory of Hawaii. In the Matter of the Estate of James Bicknell Castle, Deceased. Julia White Castle, Plaintiff in Error, vs. William R. Castle and Others, Trustees, Defendants in Error. Stipulation—Agreed Facts. Filed January 30, 1920, at 2:50 P. M. J. A. Thompson, Clerk.

No. 3443. United States Circuit Court of Appeals for the Ninth Circuit. Filed Feb. 10, 1920. F. D. Monckton, Clerk.

No. 3443

United States

Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of the Estate of JAMES BICKNELL CASTLE, Deceased.

JULIA WHITE CASTLE,

Plaintiff in Error,

vs.

WILLIAM R. CASTLE, LORRIN A. THURSTON and ALFRED L. CASTLE, Trustees Under the Will of JAMES BICKNELL CASTLE, Deceased,

Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

Upon Writ of Error to the Supreme Court of the Territory of Hawaii.

FRANCIS M. HATCH,
Attorney for Plaintiff in Error.
302 Stangenwald Bldg., Honolulu, T. H.

United States

Circuit Court of Appeals

For the Ninth Circuit.

No. 3443.

In the Matter of the Estate of JAMES BICKNELL CASTLE, Deceased.

JULIA WHITE CASTLE,

Plaintiff in Error,

vs.

WILLIAM R. CASTLE, LORIN A. THURSTON and ALFRED L. CASTLE, Trustees Under the Will of JAMES BICKNELL CASTLE, Deceased,

Defendants in Error.

Brief for Plaintiff in Error.

STATEMENT OF FACTS.

James Bicknell Castle, formerly of Honolulu, in the Territory of Hawaii, died in the year 1918, leaving surviving him a son and a widow, Julia White Castle, plaintiff in error; and, also, leaving a will which was duly admitted to probate.

The widow, the plaintiff in error, duly elected to take dower under the statute of Hawaii and repudiated the provisions made in the will in her favor.

The said James Bicknell Castle, in his lifetime, took out certain policies of life insurance in New York life insurance companies, payable to his executors, administrators or assigns. The amount covered by the policies (less certain advances by the companies) was collected in due course by the executors of said James Bicknell Castle after his decease, and passed to the possession of the defendants in error upon the approval of the accounts of the said executors on April 5, 1919, and is now held by said defendants in error, as to one-third of the same, to wit: The sum of eighteen thousand three hundred two and 73/100 ($18,302.73) dollars, subject to the decree of this court as to the right claimed therein by way of dower by said Julia White Castle, plaintiff in error.

At the time of the settlement of the accounts of the executors of the will of said James Bicknell Castle, the Judge sitting in probate, by an order dated April 5, 1919, found, as a matter of law, that, under the Hawaiian Statute of Dower, the plaintiff in error herein was entitled, by way of dower, to an absolute property in one-third part of the proceeds of said policies of life insurance, to wit: The sum of eighteen thousand three hundred two and 73/100 ($18,302.73) dollars.

Thereafter the trustees under the will of said James Bicknell Castle, being the predecessors in trust of the defendants in error herein, took an appeal from the decree of said judge in probate, upon said question of dower, to the Supreme Court of the Territory of Hawaii; such proceedings were had be-

fore said Supreme Court that said decree was reversed and, by a decree filed on the ninth day of July, 1919, said Supreme Court of the Territory of Hawaii held that the plaintiff in error herein was not entitled to share in the proceeds of said policies of life insurance, then in the hands of said trustees, subject to the order of said court.

The plaintiff in error, thereafter, within six months from the date of the filing of said last-named decree, took out a writ of error, directed to said Supreme Court of the Territory of Hawaii, returnable before this Court.

The plaintiff in error made assignment of error as follows:

I.

"That the Supreme Court of the Territory of Hawaii erred in ordering and rendering judgment that this plaintiff in error was, and is, not entitled to share by way of dower, under the laws of the Territory of Hawaii, in the proceeds of certain policies of life insurance which had been taken out by the said James Bicknell Castle in his lifetime and made payable to his executors and administrators upon his decease.

II.

That the said Supreme Court of the Territory of Hawaii erred in entering judgment against said Julia White Castle on her petition for the assignment to her of one-third (1/3) of the proceeds of said policies of life insurance which had been collected by the executors and trustees named under the will of said James Bicknell

Castle and which sum was, at the time of the application of said Julia White Castle, in court and subject to the disposition of the court as part of the estate of said James Bicknell Castle, deceased."

The statute of the Territory of Hawaii, on the subject of dower, is as follows:

"Every woman shall be endowed of one-third part of all the lands owned by her husband at any time during marriage, in fee simple, in freehold, or for the term of fifty years or more, so long as twenty-five years of the term remain unexpired, but in no less estate, unless she is lawfully barred thereof; she shall also be entitled, by way of dower, to an absolute property in the one-third part of all his movable effects, in possession, or reducible to possession, at the time of his death, after the payment of all his just debts."

The statute, as originally enacted, reads as follows:

"The wife shall in virtue of her marriage, be entitled in law to receive upon the death of her husband, by way of dower, a life estate in one third part of all immovable and fixed property owned by him at the time of her intermarriage, or acquired by him during her marriage; and an absolute property in the one third part of all his movable effects in possession or reducible to possession at the time of his death, after the payment of all his just debts."

Laws of Kamehameha III, 1846, p. 59, sec. 4.

The record presents but a single question of law, the construction of Laws of Hawaii I. Relating to Dower.

Plaintiff in error submits the following points as bearing upon the question of error by the Supreme Court of the Territory of Hawaii:

(1) The Court below applied a wrong principle of construction in considering said statute.

(2) The Court erred in giving technical construction to language not used in the technical sense.

(3) The Court erred in ignoring the intent of the legislature.

(4) The Court erred in limiting its operation of the words "movable effects" to chattels.

(5) The Court erred in ignoring the surrender value of the policies at the time of the death of the testator.

(6) The construction adopted would permit fraudulent evasion by husbands of the dower act.

1. The rule of construction.

It is obvious that the Court below applied a most rigid and narrow construction to the language of the statute. It could not have been more narrow had the statute been criminal and had imposed a penalty. Being remedial and beneficent in its design, the statute should have received a liberal construction. It can hardly be necessary to cite authorities on this point. A liberal construction would include credits and rights in action in the meaning given to "movable effects in possession, or capable of being reduced to possession." The contractual right was

capable of being reduced to possession and was so brought into possession in cash by the executors.

2. The language of the statute was not technical.

Reference to the original language used at the time the subject was first acted upon by the legislatures of Hawaii shows that the words "immovable property" and "movable effects" were intended to cover all classes of property and were used in a popular sense. The attempt to confine to one meaning only the words "movable effects," as if words like "heirs of the body" had been used, was not a reasonable construction of the statute. The Connecticut case, Strong v. White, 19 Conn. 238, relied on by defendants in error, has no application to a case involving the meaning of an act of the legislature.

3. The intent of the legislature.

The Court below ignored the obvious intent of the legislature of Hawaii to liberalize the law as to dower. No imaginable purpose could be served by limiting this benevolence so as to exclude a share in the proceeds of life insurance policies.

4. The Court erred in limiting the operation of the words "movable effects" to chattels.

That the fair construction of section 2977, Revised Laws of Hawaii, would give a widow a share by way of dower in the proceeds of policies of life insurance, taken out by the husband and made payable to his executors or administrators, is shown by the following considerations:

The language is—

> "She shall also be entitled, by way of dower, to an absolute property in the one-third part of all his movable effects in possession, or reducible to possession, at the time of his death, after the payment of all just debts."

The words "at the time of his death" import that death has occurred. The language does not compel a construction which would refer the crucial status back to the lifetime of deceased.

The whole statute is dealing with the estate of a person deceased. Can a woman be the widow of a living man?

The policy is payable at the moment of death. The sums covered then become reducible to possession. The statute nowhere says that the item of property must be reduced to possession by the husband personally, any more than it implies that the debts he leaves behind him must be paid by him in person.

When contrasted with the words "immovable or fixed property," it does no violence to language to construe the words "movable effects in possession or capable of being reduced to possession" as covering every species of credit or right in action.

When the testator took out the life insurance policies in question he parted with nothing. Naming his executors and administrators as beneficiaries simply confirmed the right to the proceeds to himself; a right which remained subject to his control to the time of his death. Defendants in error's case, Tyler v. Treasurer etc. (Mass.), 115 N. E. 300

(1919), clearly shows that it is not necessary for death to intervene to complete title to the proceeds of life insurance. The right attaches upon the designation being made in the policy.

No change of beneficiary was made by the testator in his lifetime. A general residuary clause in a will cannot have such operation. The will simply does not exist as against a widow's statutory right.

Rights of a beneficiary of life insurance policy attach immediately upon designation by contract, and are in nowise modified or increased at the time of death of the insured.

> "The rights of the beneficiary are vested when the designation is made in accordance with the terms of the contract of insurance. They take complete effect as of that time. They do not wait for their efficacy upon the happening of a future event. They are in nowise modified or increased at the time of the death of the insured.
>
> "It is indeed the general rule that the policy and the money to become due under it, belong, at the moment it is issued, to the person or persons named in it as the beneficiary or beneficiaries."
>
> Gould v. Emerson, 99 Mass. 154.
> 96 Am. Dec. 720.

James B. Castle, in legal effect, was the beneficiary named in the policies. The proceeds of such policies remained subject to his control throughout his lifetime. He did not transfer or assign the benefits to accrue under the life policies to any person. His

will cannot operate as such assignment, as far as the rights of his widow are concerned.

5. The surrender value.

These policies had a surrender value at the time of the decease of James B. Castle. The Court below plainly erred in not allowing plaintiff in error one-third part of such surrender value. How does the surrender value calculated at the time of the death of the insured differ from the full face value after the deduction of the loan made by the life companies to the deceased?

There is no room here for any metaphysical hair-splitting as to a difference in value the moment before death, or the moment after death.

II.

The Hawaiian Cases.

The Supreme Court of Hawaii, it is submitted with all deference, draws a wrong inference from the language of the Court in Trustees of Ena Estate v. Ena, 18 Haw. 538. In that case the Court was dealing with the payment of debts. But all personal estate by the Hawaiian statute is subject to the payment of debts before any allowance to the widow can be made. Therefore, where the Court uses the expression "personalty in which the widow has no dower interest," it is merely tautological.

The case of Estate of Alexandre, 19 Haw. 551, plainly is not in point. That was a case arising from a mutual agreement by members of a society to levy an assessment among survivors upon death of a member. It was stipulated that proceeds should not become a part of the estate of deceased. It was a

scheme to provide benefits for a family, to exclusion of creditors, and it was held that the exclusion might be extended to the widow.

Much more is involved in this record than a construction of a local statute by a local court. Where the domestic relations are concerned, a fairly uniform system should prevail throughout the country. The spirit of the age tends to defeat the power of control of large estates from the grave by means of freak wills, or through narrow and strained construction of statutes. If a medieval point of view shows itself in any remote locality within the controlling jurisdiction of this court, it should be scotched forthwith.

Honolulu, February 28, 1920.

Respectfully submitted,

FRANCIS M. HATCH,

For Julia White Castle,

Plaintiff in Error.

NO. 3443

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

JULIA WHITE CASTLE,
Plaintiff in Error,

vs.

WILLIAM R. CASTLE, LORRIN A. THURSTON and ALFRED L. CASTLE, Trustees under the Will of JAMES BICKNELL CASTLE, Deceased,
Defendants in Error.

No. 3443
In Error to the Supreme Court of Hawaii

BRIEF OF DEFENDANTS IN ERROR

Upon Writ of Error to the Supreme Court of the Territory of Hawaii

A. G. M. Robertson,
Alfred L. Castle,
Clarence H. Olson,
W. A. Greenwell,
Arthur Withington,
Attorneys for Defendants in Error.

Filed this.....day of.....,
1919.

F. D. Monckton, Clerk,
By....., Deputy Clerk.

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NO. 3443

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

JULIA WHITE CASTLE,
Plaintiff in Error,

vs.

WILLIAM R. CASTLE, LORRIN A. THURSTON and ALFRED L. CASTLE, Trustees under Will of JAMES BICKNELL CASTLE, Deceased,
Defendants in Error.

BRIEF OF DEFENDANTS IN ERROR

Upon Writ of Error to the Supreme Court of the Territory of Hawaii

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The defendants' testator, James Bicknell Castle, at his death left an estate of about $600,000 and had insurance policies payable to "the executors, administrators or assigns of the assured" on which was due and payable to said executors, after deducting the amount for which they were pledged, the sum of $54,908.19. The will which provided for the widow, Julia White Castle, nothing less than $1500 per month during her life was waived by her and she elected to take her dower right on July 12, 1918.

Property to the amount of $181,250 was assigned to her as dower. In the allowance of the final accounts of the executors of the will of James Bicknell Castle the Circuit Court judge ordered that sum to be increased by one-third of the proceeds of the insurance policies, holding that she was entitled to dower in said proceeds. From this order the Trustees appealed and the Supreme Court disallowed any dower right in the proceeds of the insurance policies. The statute of dower, Revised Laws, Territory of Hawaii, 1915, Section 2977, is as follows:

"Sec. 2977. In real and personal property. Every woman shall be endowed of one-third part of all the lands owned by her husband at any time during marriage, in fee simple, in freehold, or for the term of fifty years or more, so long as twenty-five years of the term remain unexpired, but in no less estate, unless she is lawfully barred thereof; she shall also be entitled, by way of dower, to an absolute property in the one-third part of all his movable effects, in possession, or reducible to possession, at the time of his death, after the payment of all his just debts."

The insurance policies were not assigned and no personal beneficiary had been designated by the assured. The net proceeds of said policies amounting to $54,908.19 was paid to the executors of the will of James Bicknell Castle. The questions are:

(1) Is a decision allowing the final accounts of an executor in the distribution of an estate and determining the widow's proportion therein under the Hawaiian statute of dower binding on the Circuit

Court of Appeals as involving only a question of local law?

(2) Is the widow entitled to dower in the proceeds of life insurance policies under the Hawaiian statute which gives her one-third of "the movable effects in possession, or reducible to possession, at the time of his (her husband's) death"?

(3) Has this court jurisdiction?

ARGUMENT.

I.

THE DECISION BELOW SHOULD BE AFFIRMED AS INVOLVING ONLY A QUESTION OF LOCAL LAW.

This court has decided when it has concurrent jurisdiction, the order of a probate court is controlled by the local law. In *Newberry v. Wilkinson,* 199 Fed. 673, 680, this court said:

"The federal courts being governed and controlled by the local laws respecting the administration of estates, their jurisdiction, in so far as it is exercised, is necessarily concurrent with the probate jurisdiction of the several states; and, being concurrent, it follows that the orders and judgments of such probate courts in the due and orderly administration of such estates are conclusive and binding on the federal courts. This latter deduction has been observed to be the case in the matter of succession of estates. *Johnson v. Waters,* 111 U. S. 640, 667."

In *Byers v. McAuley,* 149 U. S. 608, the court said, in construing statutes of distribution of estates as to whether second cousins took with first cousins:

"The Supreme Court of the United States had to deal with a question of local law. The state statutes prescribed the scheme of distribution and, if the meaning of those statutes was disputable, the construction put upon them by the state courts was binding upon the Circuit Court."

In re Barry, 42 Fed. Reporter 113, decided in 1844 and printed in the Federal Reporter at the request of a justice of the Supreme Court of the United States, it was held that the decisions of the state of New York, that the keeping of a child of seven years from its father by the mother living separately from him is not in judgment of law a detention or restraint of the liberty of the child, are final in a petition for a writ of habeas corpus in the federal court by an alien for his child in control of its mother in New York.

Slaughter v. Glenn, 98 U. S. 242, decides that the construction of statutes giving married women rights to convey her property is finally determined by the local decisions.

There are no cases directly on the question of dower that the decisions of state courts are final upon federal courts. This is owing probably to the fact that a case can hardly be imagined wherein the question could possibly arise, as in the matter of dower the claimant and the executor must have the same domicile and there cannot be diverse citizenship.

The Supreme Court of the United States, however, in construing an act of Congress affecting dower says, in *France v. Connor,* 161 U. S. 65:

"Although Congress has the undoubted power to annul or modify at its pleasure the statutes of any territory of the United States, yet an intention to supersede *the local law* is not to be presumed unless clearly expressed. (Authorities.) It cannot be presumed that Congress in an enactment which was peculiarly called for in the Territory of Utah intended to make so important a change in the law of real property in other territories of the United States."

Although the Court of Appeals is now sitting as an appellate court rather than a court of concurrent jurisdiction, all the decisions of the Supreme Court of the United States, when it occupied the same position that the Court of Appeals occupies now towards the Supreme Court of the Territory of Hawaii, held that the Supreme Court of the United States would be governed by the principle laid down for federal courts when construing local law as a court of concurrent jurisdiction.

The plaintiff in error contends that her right to dower is determined by Section 2977 of the Revised Laws of the Territory of Hawaii. Nothing is better settled than that in the construction of a local territorial statute the Supreme Court of the United States will follow the local court.

Kealoha v. Castle, 210 U. S. 149.
Luke v. Smith, 227 U. S. 379.

See also:

John Ii Estate v. Brown, 235 U. S. 342.
Hapai v. Brown, 239 U. S. 502.
Lewers & Cooke v. Atcherley, 222 U. S. 285.
Jones v. Springer, 226 U. S. 148.

Lewis v. Herrera, 208 U. S. 309.
Crary v. Dye, 208 U. S. 515.
Clason v. Matko, 223 U. S. 646.

It would seem as though no statute can be of more local character than that determining dower which depends upon domicil.

The case of *Cordova v. Folgueras y Rejos,* 227 U. S. 375, in which the interpretation of a statute involving the right of a natural child seeking filiation, where it was argued that it was not a matter of procedure under the code; but as to the existence of a right, Mr. Justice Holmes says of the decision of the local court, that of Porto Rico:

"It concerns local affairs under a system with which the court of the Island is called on constantly to deal, and we are not prepared, as against the weight properly attributed to the local decision, to say that it is wrong. *Gray v. Taylor,* 227 U. S. 51."

It is well settled that in appeals from Hawaii, the territories, the Philippine Islands and Porto Rico, the Supreme Court of the United States follows the local court, unless clear and manifest error is shown.

II.

A FEDERAL COURT HAS NO CONCURRENT JURISDICTION TO REVIEW THE QUESTION OF AN ALLOWANCE OF AN EXECUTOR'S ACCOUNT EVEN IN BEHALF OF A NON-RESIDENT.

Waterman v. Canal Louisiana Bank & Trust Co.,

215 U. S. 33-45, Mr. Justice Day, in upholding a bill in equity which was an action *in personam,* states the rule "for it is the result of the cases that, insofar as the probate administration of the estate is concerned in the payment of debts and the settlement of accounts of the executor or administrator, the jurisdiction of the probate court may not be interfered with."

III.

THIS COURT, SITTING IN AN APPELLATE RATHER THAN A CONCURRENT CHARACTER, MAY HAVE JURISDICTION AND YET THE RESULT IS THE SAME BECAUSE IT IS BOUND BY THE LOCAL LAW.

The rule has been recently affirmed in a memorandum decision in *Boeynaems v. Ah Leong,* 242 U. S. 612.

IV.

THE RULING IS THE SETTLED LAW OF HAWAII.

In the case of the *Estate of Ena v. Ena,* 18 Haw. 588, it was decided that a short term lease was not included in the provision of the statute of dower as real estate, and although it is personal property there was no dower because the lease was not a movable effect in possession or reducible to possession. It thus appears that while this lease was assets of the estate, that is not the vital question in determin-

ing dower in personalty, but as to whether it is a "movable effect."

In re Alexandre, 19 Haw. 551, the Court was called upon to decide whether the proceeds of a life insurance policy were

1. Assets of the estate.
2. Subject to dower.

The first question was decided in the affirmative and the second in the negative on the ground that the proceeds were not "movable effects in possession or reducible to possession" at the time of the testator's death.

In both this case and the Alexandre case the following facts are common:

(1) The proceeds in both cases were payable to such persons as should be designated by will or had been designated by order left with the executive officers of the insurer.

(2) In both cases there had been a designation of the executors as beneficiary.

(3) In both cases the widow had been provided for by will.

(4) In both cases the widow had elected dower.

(5) In the Alexandre case there was a specific determination by the court that the proceeds of the policy were assets of the estate, and the court held that the widow had no dower therein, yet it is upon the fact that the proceeds of the policies in the case at bar are assets of the estate that the widow bases her claim to dower.

(6) Upon all these facts, the court held that

"The money in question was not personal property of the decedent nor any part of his movable effects in possession or reducible to possession by him at the time of his death, nor was it subject to any disposition other than that which he should direct by will or written declaration to the society."

That is exactly the claim of the trustees in the case at bar.

In re Vida, 1 Haw. 107, the court in discussing the phrase "immovable and fixed property" when construing the dower statute says these words are used, to mean lands and tenements, in contradistinction to money, goods, wares, furniture and other species of movable property. All of these have situs, while the insurance policy in this case had merely a situs as a paper or as evidence of a right to the proceeds after the death of James Bicknell Castle.

V.

THE CONSTRUCTION OF THE STATUTE IS TO BE THE SAME NOW AS IN 1846.

The plaintiff in error argues that times have changed and that a more liberal view as to a widow's right to dower should be taken by the courts of the present day. Passing the question whether the liberal or modern view is not that which works an absolute separation of interest in the other's property save by inheritance by husband or wife, the answer is that the words "movable effects in possession or reducible to possession at the time of his death"

mean exactly what was meant at the time the statute of 1846 was passed.

It is not for the courts to change the meaning of statutes, but for legislatures. This is best illustrated in the case of *Commonwealth v. White,* 190 Mass. 578, which was a conviction of the defendant for violating the Sunday law by doing work which was not "necessary". The court said that the word necessity meant the same as it did when it was passed in 1690, and if a change was desired it was for the legislature and not the court to make the change. The meaning of a word may enlarge by time through changes in material things, as the word vehicle used in 1846 might now include an automobile in a statute with such an intent, but the abstract idea conveyed by the difference between what is tangible and what is intangible doesn't change by time.

VI.

THE APPEAL SHOULD BE DISMISSED, AS THERE HAS BEEN NO FINAL DECREE FROM WHICH AN APPEAL HAS BEEN TAKEN.

It is respectfully suggested that the probate court has since refused to enter a final decree in pursuance of the mandate of the Supreme Court of the Territory of Hawaii,treating this appeal as a supersedeas; that upon entry of a final decree the identical questions herein set forth may be brought to this court; that although the defendants in error cannot waive the question of jurisdiction, the records show matters

which on their face determine all questions and which are so nearly akin to the question of jurisdiction as to be almost indistinguishable, to-wit:

First, circuit courts hold they have no jurisdiction to review an order of distribution of the assets of an estate by a state court.

Second, this record shows, on page 32, that the plaintiff in error signed an assent to a decree agreeing with the executors that these assets of the estate should pass to the defendants in error.

Third, this is plainly a local decision which this Court affirms as a matter of course without reviewing the merits.

VII.

THERE IS NO QUESTION RAISED AS TO DOWER IN THE CASH SURRENDER VALUE OF THE POLICIES OF INSURANCE, WHICH HAD EVIDENTLY BEEN EXHAUSTED BY THE LOAN ON THEM BY THE NEW YORK LIFE INSURANCE CO. OF $65,169.72.

The plaintiff in error attempts in her brief to open up a question which has never been raised and is not now raised under her assignments in error, to-wit: Whether she was entitled to dower in the surrender value of said life insurance policies. As the amount of insurance according to the accounts was $120,077.91, and there is deducted therefrom the debt to the New York Life Insurance Co. of $65,169.72, leaving a balance of $54,908.19, being the sum admitted as having been received by the executors, it would

appear that the testator had availed himself substantially of any cash surrender value. But the question to be determined is whether the widow was entitled to dower in the surplus or proceeds paid to the executors as beneficiaries named in the policies. This is the vital distinction between the policy as a chattel and the proceeds of the policy which passed from the insurance company to the executors after the death and were never in the possession of the testator and to reduce which to possession was never in his power.

The only case cited in the plaintiff in error's brief, *Gould v. Emerson,* 99 Mass. 154, involved the construction of a Massachusetts insurance statute for the benefit of married women, and so far as the case has any bearing on the question herein involved supports the contention of the defendants in error. J. B. Castle named his executors as beneficiaries under the policies to take in trust for his creditors and the purposes of his will. They did not take for the benefit of anyone who attacked his will.

VIII.

THE GENERAL PROPOSITION OF LAW IS CORRECT.

2 Bouvier's L. Dic. 2266 says of "movables" that:

"Things movable by their nature are such as may be carried from one place to another, whether they move themselves, as cattle, or cannot be removed without an extraneous power, as inanimate things. * * * Movables are further distinguished into

such as are in possession, or which are in the power of the owner, as a horse in actual use, a piece of furniture in a man's own house; and such as are in the power of another, and can only be recovered by action, which are therefore said to be in action, a debt. But it has been held that movable property, in a legacy, strictly includes only such as is corporeal and tangible; not, therefore, rights in action, as judgment or bond debts." Citing authorities.

Sullivan v. Richardson, 33 Fla. 1, 14 So. 692, 709, says:

"Things were divided into those which were corporeal and those which were incorporeal; the former being those which may be seen and touched, and they being either movable or immovable, and movables being those which can move naturally by themselves, or be moved by man, and immovables being those which can neither move naturally themselves, nor be moved by man."

In discussing the question of whether proceeds of insurance policy went by succession so as to be subject to the succession tax, the Massachusetts court says in *Tylor v. Treasurer and Receiver General,* 226 Mass. 306, 115 N. E. 300, 301:

"The insured retains no ownership of that which has passed to the beneficiary under the contract. A reserved right to change the beneficiary does not effect the essential nature of the rights of the beneficiary so long as they last. Whatever the insured does in way of designation of a beneficiary takes effect forthwith. If his act rightly be describable as a gift, it is a present gift which, so far as concerns him, takes effect at once both in possession and enjoyment by the beneficiary. *Atty. Gen. v. Clark,* 222 Mass. 291, 110 N. E. 299. There is no fund in which

he has an ownership which is the subject of his act in designating the beneficiary, as in *New England Trust Co. v. Abbott,* 205 Mass. 279, 91 N. E. 379. * * * The insured has no title to the amount due on the policy. He does not and cannot make a gift of that. The right to that amount as an instant obligation does not spring into existence until after his death. Even then the money belongs to the insurer, who is charged with the duty by the contract to pay the beneficiary. So far as the insurer is a 'grantor,' to use the words of the statute, the only thing which he grants or can grant is an interest in a contract."

A gift *causa mortis* passes out of the donor by his death and ownership ceases by the same event which gives rise to a right to proceeds of insurance. If a man had $10,000 in cash of which he made a gift *causa mortis* and an insurance of $10,000 payable to his executors, he could not be in possession of both sums at the same time, as there was no time at which the rights were concurrent in him or his executors. Consequently a widow under the Hawaiian statute could not have dower in both.

In *Hatcher v. Buford,* 60 Ark. 169, 27 L. R. A. 507, the court held a husband died seized or possessed of a gift *causa mortis.*

In *Andrews v. Partridge,* 228 U. S. 479, the court held that the trustee in bankruptcy was only entitled to the cash surrender value of a policy, the insured having died before he was discharged. This was in construing the bankruptcy act.

Life insurance was payable to the legal heirs or assigns of the deceased. By his last will and testament the deceased bequeathed the policy to his chil-

dren. His widow renounced the will, in conformity with the provisions of the statute, and elected to take in lieu thereof her dower and legal share in the estate. The question arose whether she was entitled to one-third of the insurance money which she claimed as legal heir. The dower provision of the statute gave the widow as her absolute personal estate one-third of all the personal estate of the intestate. The court held that this dower right did not make the widow an heir and that consequently the entire amount of the policy was payable to the children. The statute also provided that upon her renunciation of the will, a wife was entitled to dower in the land and to one-third of the personal estate after the payment of debts.

Gauch v. St. Louis M. L. Ins. Co., 88 Ill. 251, 30 A. R. 554.

A life insurance policy payable to the assured, his executors, administrators and assigns, is assignable and does not constitute an asset of the succession of the person insured and so come within the prohibition against assignment of the Civil Code. The court said:

"And it is evident that Stuart had no succession in the ordinary acceptation of the term, while living, and his heirs had no inheritance. The denunciation of Article 2454 of the code is directed against a sale of the succession of a living person, which it declares not to be the subject of sale, evidently because such a sale could, in the very nature of things, only be prospective and uncertain; the law declaring that

'succession is the transmission of the rights and obligations of the deceased to his heirs.' Rev. Civ. Code, Art. 871 et seq."

Stuart v. Sutcliffe, 46 La. A. 240, 14 So. 912.

Where a policy of insurance was taken out on the life of the mother for the benefit of the daughter, the proceeds belonged to the daughter and formed no part of the succession of the mother.

Succession of Emonot, 109 La. 359, 33 So. 368.

Attorneys for Defendants in Error.

No. 3443.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JULIA WHITE CASTLE,

Plaintiff in Error,

vs.

WILLIAM R. CASTLE, LORRIN A. THURSTON and ALFRED L. CASTLE, Trustees Under the Will of James Bicknell Castle, Deceased,

Defendants in Error.

REPLY BRIEF OF PLAINTIFF IN ERROR.

FRANCIS M. HATCH,
Attorney for Plaintiff in Error.

THE RECORDER COMPANY, 689 STEVENSON ST., S. F.

No. 3443.

IN THE

United States Circuit Court of Appeals

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Defendants in Error.

REPLY BRIEF OF PLAINTIFF IN ERROR.

Defendants in error, having made the point that the issue involves nothing but the construction of a local statute, and that this Court should therefore dismiss the writ, plaintiff in error asks leave to file this brief in reply.

I. (1) Defendants in error, on page 5 of their brief, say:

> "The plaintiff in error contends that her right to dower is determined by section 2977 of the Revised Laws of the Territory of Hawaii. Nothing is better settled than that in the construction of a local territorial statute the Supreme Court of the United States will follow the local court."

A glance at the cases cited will show that not one of them questions the power of the Supreme Court of the

United States in a proper case to overrule the local court. These cases all recognize this power emphatically by the choice of language used in declining to exercise the power in the particular instance. Without exception when the local court is confirmed it is because a strong enough case has not been made out to induce the Supreme Court to intervene.

For instance, in *Kealoha* v. *Castle,* 210 U. S. 153, the Court says the rule is that *we lean towards* the interpretation of a local statute adopted by the local court. "Weight attaches to the construction given by the local court."

In *Jones* v. *Springer,* 226 U. S. 157, the Court says:

> "On that question, as usual, we follow the ruling of the Supreme Court of the Territory, *unless there are stronger reasons to the contrary* than are shown here."

In *Licks* v. *Smith,* 227 U. S. 379, the language used is "in accordance with a leaning many times declared," etc.

In *Hapai* v. *Brown,* 239 U. S. 502, saving language is used, "Upon a matter like this." (Question as to multifariousness.)

In *Cary* v. *Dye,* 208 U. S. 515, "the views of the local courts are very persuasive of the construction of local statutes."

In *Classon* v. *Matko,* 223 U. S. 646:

> "Even if we should concede that the statute is ambiguous we certainly should lean to agreement with the Supreme Court of the Territory."

In *John Ii Estate* v. *Brown*, 235 U. S. 342, the matter was of *local procedure.*

In *Lewers & Cooke* v. *Atcherly*, 222 U. S. 285, the Court says:

> "Acting on this rule, as to the application of which in practice, we see no sufficient reason for not following," etc.

A distinction must be made between cases coming up from state courts and those arising in a territory. In the latter cases the propriety or desirability of a review by the Federal Court of Appeals is plain.

In purely local questions the general rule undoubtedly would be followed. For example, in the case of Hawaii, questions of water rights are unquestionably local and distinctive because based on immemorial usage.

The case at bar has no local individuality; it is a question of dower, and unless marriage, death and dower are local to Hawaii these questions do not fairly come within the narrow category above named. The general public policy of the nation applies.

It is submitted that the case at bar distinctly involves a nation-wide policy.

(2) The law in question is in force in the Territory of Hawaii solely through force of section 6 of an act entitled An Act to Provide a Government for the Territory of Hawaii, approved April 30, 1900. It is therefore an act of Congress and a local law only in its application.

The passage of this particular provision (as is true of the whole act) took place only after the report of

the Commission appointed by the President of the United States to recommend legislation for the benefit of the Territory of Hawaii.

II. That the ruling is settled law in Hawaii.

Estate of Ena v. *Ena,* 18 Haw. 588, has no visible bearing.

In re Alexandre, 19 Haw. 551, appears to be misunderstood by defendants in error. Counsel say on page 8 of their brief, paragraph (5):

> "In the Alexandre case there was a specific determination by the court that the proceeds of the policy were *assets* of the estate, and the court held that the widow had no dower therein."

Both the language and the meaning of the court are departed from in defendants' quotation. Please mark the word "assets." Where is it found in that decision?

The case at the outset states, quoting from the by-laws of the association,

> "the by-laws providing that 'for all legal purposes the donation * * * is not considered as assets of the estate of the deceased.' "

The "donation" was made with that condition. Hence it was not subject to payments of debts. In the case at bar the policies being payable to executors or administrators of deceased, must be held to have been intended by him to provide a fund for the quick payment of debts.

Again, in the Alexandre case the beneficiary by the by-laws was empowered to assign the benevolence by a will. He did so, excluding his widow. Thus

this case joins the list of many others quoted by defendants in error in which the insured has assigned the policy to others. For instance, on page 15 of their brief, the case of *Gauch* v. *St. Louis M. L. Ins. Co.,* 88 Ill. 251, is set out. The beneficiary being "legal heirs" the decision was the widow was not a legal heir. The case has no more application here than if the policy had carried the names in full of the legal heirs. Practically it had been assigned to others.

III. In section V of their brief (page 9) defendants in error lose the point of plaintiff in error's contention.

It has not been suggested that the words "movable effects in possession" mean anything different now than when they were enacted in 1846.

On the contrary, counsel for the widow (the present plaintiff in error) produced the original text of the enactment and proved from it that defendants in error narrow construction of the quoted words is unsound. Only subsequent amendments, in which the opposed ideas of property fixed and property movable was lost sight of, gave the pretext for such argument as defendants in error have advanced.

The law as originally passed carries on its face the idea of liberality to widows.

IV. In fact, no question of life insurance was before the Probate Court in this case. The executors filed final accounts showing certain money in hand for distribution. It bore no ear-mark. It was subject to no equity. No person intervened claiming rights under the policies of insurance. The Probate Court, in accordance with immemorial practice in Hawaii,

awarded the widow one-third of the sum, as money, not as life insurance. On appeal to the Supreme Court of the Territory of Hawaii various arguments were advanced by counsel for defendants in error to show that the order of distribution was wrong. These arguments were based on three contentions:

(a) That proceeds of life policies were not "property" within the meaning of the statute.

(b) That proceeds of life policies formed no part of the estate.

(c) That the words "movable effects in possession," etc., do not include cash.

Reference was made by plaintiff in error to the surrender value of policies simply to illustrate the fallacy of defendants in error argument.

It is the wide-reaching effect of the claim that the words "movable effects," as used in section 2977, Revised Laws of Hawaii, can not include money in the hands of executors and administrators, which gives force to plaintiff in error's argument that this Court should intervene.

So much more than the rights of this claimant is involved, and the danger that a false rule affecting possibly half the estates of deceased persons in Hawaii for years to come is so great this Court should overcome any reluctance to interfere, and should sweep away the flimsy barrier of "local statute only" raised by defendants in error.

The final and convincing reason (it is submitted) why this Court should intervene is that the Supreme Court of Hawaii has plainly applied a wrong rule of interpretation to the statute in question.

A remedial statute has been construed as is a criminal law when courts strain to save the rights or lives of individuals. This wrong rule of interpretation has been applied to a law affecting property rights of women who may be widows. Complete uniformity in questions of domestic relations can not be had under our system of state governments. Uniformity of interpretation, consistent liberality of construction in matters of law affecting women can easily be obtained in Territories of the United States through the supervising power of the Federal Courts of Appeal.

An outlying territory with a strong sag towards the Orient can be helped back into harmony with the Union at large through a review by this Court. It would seem that the Court would welcome such an opportunity.

Respectfully submitted,

FRANCIS M. HATCH,
Attorney for Plaintiff in Error.

NO. 3443

IN THE
United States Circuit Court of Appeals
FOR THE
NINTH CIRCUIT

JULIA WHITE CASTLE,
Plaintiff in Error,
vs.
WILLIAM R. CASTLE, LORRIN A. THURSTON and ALFRED L. CASTLE, Trustees under the Will of JAMES BICKNELL CASTLE, Deceased,
Defendants in Error.

No. 3443.
In Error to the Supreme Court of Hawaii.

PETITION FOR RE-HEARING

Upon Writ of Error to the Supreme Court of the Territory of Hawaii

A. G. M. Robertson,
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Attorneys for Defendants in Error.

Filed this.....day of....., 1919.

F. D. Monckton, Clerk,
By....., Deputy Clerk.

NO. 3443

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

JULIA WHITE CASTLE,

Plaintiff in Error,

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Defendants in Error.

PETITION FOR RE-HEARING

Having carefully examined the opinion of the Honorable Court, we think that with propriety we may ask the court to consider whether this case be not one on which it will be proper to grant a rehearing to the defendants in error on the ground that—

1. The decree of the Supreme Court of the Territory of Hawaii was not a final judgment, which question is not passed upon in the opinion.

Coe v. Armour Fertilizing Works, 237 U. S. 412;

Bruce v. Tobin, 245 U. S. 18;

Winn v. Jackson, 12 Wheat. 135;

Moore v. Robbins, 18 Wall. 588;

District of Columbia v. McBlair, 124 U. S. 320;

Smith v. Adams, 130 U. S. 167;
Lodge v. Twell, 135 U. S. 232;
Haseltine v. Central Nat. Bank, 183 U. S. 130;
Louisiana Nav. Co. v. Commission, 226 U. S. 99.

2. The form of the decree finally determines its character.

Cases cited supra.

3. The decision of the Supreme Court was merely a ruling upon an interlocutory order in the partial distribution of the estate of J. B. Castle. The executors now have in their hands the $18,302.75 subject to the further order of the probate court and the executors are not even parties hereto.

The order appealed from ended with this provision: "Jurisdiction is hereby retained to make and enter any other order or orders, decree or decrees from time to time upon the petition for allowance of accounts determining trust and distributing the estate." Transcript of Record, page 38. The probate court therefore retains jurisdiction to revoke the order from which an appeal was taken, and the decision of the Supreme Court of the Territory is merely a ruling of law passing upon an interlocutory order as provided by the statutes of the Territory.

Mix's Appeal, 35 Conn. 121, 95 Am. Decisions 222;
18 Cyc. 630, Note 51.

4. The question of dower in this case is not "very broad and clearly of a more general nature than are matters of local usages," as the common law dower never obtained in Hawaii and whether there is or is not dower depends entirely on the construction of a local statute which the territorial legislature may amend or repeal in determining how estates of its decedents shall be distributed.

5. The law is left in an uncertain state, as the court apparently decides "movable effects in possession or reducible to possession means all property not real estate," but does not overrule *Estate of Alexandre,* 19 Haw. 551, or *Ena Estate v. Ena,* 18 Haw. 588, which decide that there is property not real estate which is not subject to dower.

WHEREFORE, upon the foregoing ground defendants in error and petitioners respectfully pray this Honorable Court to grant to them a rehearing of said cause.

Dated, Honolulu, August 16, 1920.

A. G. M. ROBERTSON,
ALFRED L. CASTLE,
CLARENCE H. OLSON,
W. A. GREENWELL,
ARTHUR WITHINGTON,
Attorneys for Defendants in Error.

I, ARTHUR WITHINGTON, of counsel for the appellee herein, do hereby certify that in my judgment the foregoing petition for a rehearing is well founded and that the same is not interposed for delay.

ARTHUR WITHINGTON.

No. 3444

United States

Circuit Court of Appeals

For the Ninth Circuit.

6

EMMA F. RUMSEY,

Appellant,

vs.

NEW YORK LIFE INSURANCE COMPANY, and BENSON, SMITH & COMPANY, LIMITED,

Appellees.

Transcript of Record.

Upon Appeal from the Supreme Court of the Territory of Hawaii.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 3444

United States

Circuit Court of Appeals

For the Ninth Circuit.

EMMA F. RUMSEY,

Appellant,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

AT CHAMBERS—IN EQUITY.

ACTION TO REFORM AN INSTRUMENT AND DECLARE A TRUST.

EMMA FORSYTH RUMSEY,

Petitioner,

vs.

NEW YORK LIFE INSURANCE COMPANY, a Corporation, and BENSON, SMITH & COMPANY, LIMITED, a Corporation,

Respondents.

Stipulation Fixing Time for Filing Amended Bill of Complaint.

It is hereby stipulated and agreed by and between the parties hereto that petitioner may file amended bill of complaint on or before the 10th day of June, 1916, without applying to the Court for the privilege of amending said complaint, and that respondents shall have 40 days from the date of filing said amended complaint and the serving of a copy upon

them within which time to answer, demur or otherwise plead to said amended complaint.

Dated, Honolulu, T. H., June 5, A. D. 1916.

(S.) LORRIN ANDREWS,
Attorney for Petitioner.

(S.) THOMPSON, MILVERTON & CATHCART,
FWM.
Attorneys for Respondent, New York Life Insurance Company.

(S.) HOLMES & OLSON,
Attorneys for Respondent, Benson, Smith & Company, Limited.

[Endorsed]: Eq. No. 1993. Reg. 2, pg. 242. No. ——. Circuit Court First Circuit, Territory of Hawaii. Emma Forsyth Rumsey, Petitioner, vs. New York Life Insurance Co., a Corporation, et al., Respondents. Stipulation. Filed June 13, 1916, at 5 Minutes Past 4 o'clock P. M. (S.) Henry Smith, Clerk. Lorrin Andrews, Honolulu, T. H., Attorney for Petitioner. [1*]

*Page-number appearing at foot of page of original certified Transcript of Record.

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

AT CHAMBERS—IN EQUITY.

ACTION TO REFORM AN INSTRUMENT AND DECLARE A TRUST.

EMMA FORSYTH RUMSEY,

Petitioner,

vs.

NEW YORK LIFE INSURANCE COMPANY, a Corporation, and BENSON, SMITH & COMPANY, LIMITED, a Corporation,

Respondents.

Amended Bill of Complaint.

To the Honorable, the Presiding Judge at Chambers, of the Circuit Court of the First Judicial Circuit of the Territory of Hawaii:

Humbly complaining, your oratrix, Emma Forsyth Rumsey, through her attorney, Lorrin Andrews, presents this, her petition, and alleges as follows:

I.

That your petitioner is the widow of Samuel L. Rumsey, formerly a resident of Honolulu, and who died on the 27th day of July, 1910.

II.

That the respondent, the New York Life Insurance Company, is a corporation incorporated under the laws of the State of New York for the purpose of insuring the lives of individuals and at all times hereinafter mentioned was, and now is, engaged in the busi-

ness of life insurance with offices in the Territory of Hawaii and having the right to do business in said Territory, and doing business in the Territory of Hawaii.

III. [2]

That the respondent, Benson, Smith & Company, Limited, is, and at all times hereinafter mentioned was, a corporation incorporated under the laws of the Territory of Hawaii for the following purposes only: "the buying, selling and dealing in and manufacturing drugs, medicines and other commodities pertaining to said line of business."

IV.

Your oratrix further presents that on or about the 11th day of June, 1903, the aforesaid Samuel L. Rumsey was a resident of Honolulu, Territory of Hawaii, and filed an application at Honolulu, in the Territory of Hawaii, with the agent of the New York Life Insurance Company, representing said corporation in the Territory of Hawaii, for the purpose of having issued a certain policy upon his life, and made application to said New York Life Insurance Company at Honolulu aforesaid, for said policy of life insurance; that a copy of said application is attached hereto and marked Exhibit "A"; that thereafter the New York Life Insurance Company, in accordance with said application filed by the said Samuel L. Rumsey, as aforesaid, issued to the said Samuel L. Rumsey a policy upon his life and caused the same to be delivered to him at Honolulu aforesaid, wherein it agreed, as follows:

"NEW YORK LIFE INSURANCE COMPANY agrees to pay FIVE THOUSAND DOLLARS to the Firm of Benson, Smith & Co., Ltd., or its legal representatives, or to such beneficiary as may have been duly designated, at the Home Office of the Company, in the City of New York, immediately upon receipt and approval of proofs of the death of SAMUEL L. RUMSEY, the Insured, of Honolulu, in the Island of Oahu, Hawaii.

CHANGE OF BENEFICIARY.—The Insured, having reserved the right, may change the Beneficiary, or Beneficiaries, at any time during the continuance of this Policy, by written notice to the Company at the Home Office, provided this Policy is not then assigned. The Insured may at any time, by written notice to the Company at the Home Office, declare any Beneficiary then named to be an Absolute Beneficiary under this Policy. No designation, or change of Beneficiary, or declaration of an Absolute Beneficiary, shall take effect until endorsed on this Policy by the Company at the Home Office. During the life-time of an Absolute Beneficiary, the right to revoke or change the interest of that beneficiary will not exist in the insured. If any Beneficiary or [3] Absolute Beneficiary, dies before the Insured, the interest of such beneficiary will become payable to the Executors, Administrators or Assigns of the Insured."

a copy of which said life insurance policy so issued by the respondent, New York Life Insurance Com-

pany, and delivered to the said Samuel L. Rumsey, at Honolulu, aforesaid, is attached hereto and marked Exhibit "B"; that the signatures of John A. McCall, as President of the New York Life Insurance Company, Chas. C. Whitney, as Secretary thereof, and Wm. W. Cernan, Registrar, were affixed, to the best of your oratrix' information and belief, in the City and State of New York.

V.

And your oratrix further alleges: That at the time of the issuance of said policy, there was no such firm or corporation as "the Firm of Benson, Smith & Co., Ltd."

VII.

And your oratrix further alleges that at the time of the issuance of said policy, Benson, Smith & Company, Limited, a corporation, was in business and was engaged in the wholesale drug business and in such business only as stated in its charter of incorporation, as set forth in paragraph III of this petition, in the city and county of Honolulu, Territory of Hawaii, and one, Geo. W. Smith, was President of the said corporation and the said Samuel L. Rumsey was the treasurer thereof; that by reason of the connection of the said Samuel L. Rumsey with the said Benson, Smith & Co., Ltd., the said policy passed into the physical possession of the said Benson, Smith & Co., Ltd., a corporation, and was left in the possession of the said corporation when the said Samuel L. Rumsey ceased his connection therewith and departed from the Territory of Hawaii, as hereinafter set forth, and upon information and belief,

your oratrix alleges that the said Benson, Smith & Co., Ltd., has ever since, and now has, physical possession of the paper writing evidencing the said policy. [4]

VII.

And your oratrix further alleges that shortly after the *the* issuance of the said policy on the life of the said Samuel L. Rumsey, the health of the said Samuel L. Rumsey became so impaired that he, the said Samuel L. Rumsey, was compelled to and did cease active connection with the business of Benson, Smith & Company, Limited, respondent herein, and in the month of January, 1904, left the Territory of Hawaii, and was never again actively connected with the said Benson, Smith & Company, Limited, respondent herein, or the business thereof, and he, the said Samuel L. Rumsey, never again returned to the Territory of Hawaii.

VIII.

And your oratrix further alleges that in the month of February, 1905, the said Benson, Smith & Company, Limited, displaced the said Samuel L. Rumsey from the position of treasurer of said corporation, which was the position that the said Samuel L. Rumsey had theretofore and at the time of the taking out of said policy, held in the said Benson, Smith & Company, Limited, and elected another in his stead and he, the said Samuel L. Rumsey, never was re-elected to, and never resumed, the said position or any position in the said Benson, Smith & Company, Limited, in which he had any voice, control, direction or authority over, or part or participation in, the manage-

ment of the said Benson, Smith & Company, Limited.

IX.

And your oratrix further alleges that at the time the said policy of insurance was issued and until the month of October, 1904, the said Samuel L. Rumsey was a salaried officer of the said Benson, Smith & Company, Limited, the respondent, drawing the sum of Two Hundred Fifty Dollars ($250) per month as the salary of his said position of treasurer; but in the month of October, 1904, it having become apparent to him, the said Samuel L. Rumsey, and to the said [5] Benson, Smith & Company, Limited, respondent herein, that he, the said Samuel L. Rumsey, could not on account of the condition of his health ever return to Hawaii or ever again resume active connection with the said Benson, Smith & Company, Limited, respondent herein, or the business thereof, it was agreed between the said Samuel L. Rumsey and the said Benson, Smith & Company, Limited, that his said salary should, and the same did then cease and he the said Samuel L. Rumsey, never thereafter drew any salary, emolument, or compensation from the said Benson, Smith & Company, Limited, respondent therein.

X.

And your oratrix further alleges that on the 31st day of August, 1905, your oratrix and the said Samuel L. Rumsey were intermarried at Denver, Colorado, and that shortly thereafter and prior to the date next hereinafter mentioned, the said Samuel L. Rumsey notified the said Benson, Smith & Company, Limited, respondent herein, that in pursuance to the

terms of the policy of insurance, as set forth in paragraph IV of this petition, he desired, intended to and would name and designate your oratrix as the beneficiary of said policy of insurance in pursuance of the right to him reserved in said policy, and your oratrix alleges that if Benson, Smith & Company, Limited, respondent herein, had ever had any insurable interest, or any interest, in the life of him, the said Samuel L. Rumsey, or any interest in the said policy, all and every such interest had ceased, determined and was then at an end because of the fact that the said Samuel L. Rumsey had dissolved and discontinued his business connection with the said Benson, Smith & Company, Limited, respondent herein, and the business thereof, as herein set forth, and that the said Benson, Smith & Company Limited, held said policy of insurance only as a trustee for the said Samuel L. Rumsey. [6]

XI.

And your oratrix further alleges that on the 10th day of July, 1907, the said Samuel L. Rumsey, in pursuance of the right and privilege in said policy reserved to him, and for the purpose of naming, designating and making your oratrix the beneficiary of and under said policy, made and executed a written notice as follows, to wit:

"The beneficiary under policy No. 3,442,989, in accordance with the change of beneficiary clause thereof, is hereby changed from Benson, Smith & Co. to Emma Forsyth Rumsey.

The policy is not now assigned.

S. L. RUMSEY,
Insured.

JOHN W. GRAHAM, Jr.
Witness."

which said written notice was made upon a blank furnished to him, the said Samuel L. Rumsey, by the New York Life Insurance Company, respondent herein, for that purpose, and which said written notice was immediately thereafter delivered to the said New York Life Insurance Company at the Home Office, and thereby he, the said Samuel L. Rumsey, designated and named your oratrix as the beneficiary under said policy.

XII.

Your oratrix further alleges that afterwards, to wit, on the 11th day of June, 1910, the said New York Life Insurance Company did accept and receive from your oratrix, as beneficiary under said policy, the annual premium of Two Hundred Thirty-two Dollars and thirty cents ($232.30) then due and payable upon said policy.

XIII.

And your oratrix further alleges that no designation of an absolute beneficiary under said policy was ever made and said policy was never assigned; that your oratrix and the said Samuel L. Rumsey tendered to the New York Life Insurance Company, respondent herein, the premium due upon said policy for the years 1907, 1908, 1909 and the same was paid for the year 1910, as hereinafter set forth. [7]

XIV.

And your oratrix further alleges that at the time of the issuance of said policy of insurance, the said George W. Smith held three hundred sixty-three (363) shares of the capital stock of the said Benson, Smith & Company, Limited, respondent herein; that the said Samuel L. Rumsey held one hundred (100) shares, and one, A. J. Gignoux held thirty (30) shares thereof, the remaining seven (7) shares being divided among three other people; that the said Samuel L. Rumsey never held more than one hundred (100) shares of the said capital stock of the said Benson, Smith & Company, Limited, which one hundred (100) shares were of the par value of Ten Thousand Dollars ($10,000).

XV.

And your oratrix further alleges that on or about the 9th day of July, 1907, the said Samuel L. Rumsey, for a good and valuable consideration, transferred the said one hundred (100) shares of the capital stock of the Benson, Smith & Company, Limited, respondent herein, theretofore held by him, to your oratrix; that shortly thereafter your oratrix sold one-half of said shares, to wit, fifty (50) shares thereof, to the said Benson, Smith & Company, Limited, through the said George W. Smith, the President thereof; that your oratrix continued to hold the remaining fifty (50) shares of stock until after the death of the said Samuel L. Rumsey, when the same were sold to Benson, Smith & Company, Limited, or to the said George W. Smith, President, thereof, the

exact facts in that respect being to your oratrix unknown.

XVI.

And your oratrix further alleges that she, as well as the said Samuel L. Rumsey, about the month of August, 1907, and at divers times thereafter gave notice to the said Benson, Smith & Company, Limited, respondent herein, not to pay any further premiums upon the said policy mentioned in paragraph IV of this petition and [8] that the said Samuel L. Rumsey had, pursuant to the right to him reserved in said policy, changed the name of the beneficiary in said policy and designated your oratrix as his beneficiary and that no right of the said Benson, Smith & Company, Limited, in the said policy or the proceeds thereof was or would be recognized by him, the said Samuel L. Rumsey, or by your oratrix, except the right to be repaid such premiums as the said Benson, Smith & Company, Limited, had theretofore paid on the said policy and which had not otherwise been paid by him, the said Samuel L. Rumsey, all of which premiums the said Samuel L. Rumsey then and there offered to pay to the said Benson, Smith & Company, Limited, respondent herein, and your oratrix and the said Samuel L. Rumsey then and there demanded of the said Benson, Smith & Company, Limited, that it deliver the said policy to him, the said Samuel L. Rumsey, so that the said Samuel L. Rumsey could have the fact that your oratrix had been named as beneficiary thereof, as herein set forth, endorsed upon said policy, but the said Benson, Smith & Company, Limited, respondent herein, failed

and refused so to do; that the said change in the name of beneficiary in the policy so made by the said Samuel L. Rumsey in and by the notice aforesaid was never endorsed upon the said policy solely because and on account of the failure and refusal of the said Benson, Smith & Company, Limited, to deliver the said policy to your oratrix or to the said Samuel L. Rumsey, or to the said New York Life Insurance Co., respondent herein, for the purpose of having the said endorsement made, and by reason of its failure to deliver up said policy, and through no fault of the said Samuel L. Rumsey or your oratrix.

XVII.

And your oratrix further alleges that in the year 1907, and from year to year thereafter, your oratrix has, as beneficiary under the said policy, as well as a stockholder of said Benson, Smith & Company, Limited, respondent herein, notified the said [9] Benson, Smith & Company, Limited, not to pay and forbade the said Benson, Smith & Company, Limited, to pay, or attempt to pay, any premiums upon said policy and notified the said Benson, Smith & Company, Limited, that, if any such premiums were so paid by it that the same would be paid wholly at its own risk and that your oratrix would not be bound thereby.

XVIII.

And your oratrix further alleges that the said Samuel L. Rumsey departed this life in Los Angeles, State of California, on the 27th day of July, 1910, and that at the time of his death your oratrix was his lawful wife.

XIX.

And your oratrix further alleges that on the 15th day of August, 1910, your oratrix presented to the said New York Life Insurance Company, respondent herein, at its Home Office in the City of New York, proofs of the death of the said Samuel L. Rumsey and that said proofs of death were made out in full compliance with the rules and regulations of the New York Life Insurance Company, respondent herein, and the said policy, with respect to proofs of death, and upon blanks furnished by the said New York Life Insurance Company to your oratrix for that purpose, and thereupon your oratrix became entitled to have the said proofs of death approved and to the payment of the said sum of Five Thousand ($5,000), but nevertheless the said New York Life Insurance Company, respondent herein, refused and still refuses to pay said Five Thousand Dollars ($5,000) to your oratrix, but such refusal is not upon the ground that said proofs of death are not sufficient or are not such as should be approved by said New York Life Insurance Company; that no other or further proofs of death of the said Samuel L. Rumsey were ever furnished said New York Life Insurance Company. [10]

XX.

That on or about the 15th day of August, 1910, in the District Court of the city and county of Denver, State of Colorado, your oratrix brought suit against the said New York Life Insurance Company, a corporation, to compel the said New York Life Insurance Company to pay to her the sum of Five Thousand

Dollars ($5,000) with interest thereon, in accordance with the terms of said policy, and that said cause of action continued in said District Court until the 21st day of January, 1913, when, trial having been had, a judgment of nonsuit was entered against your oratrix and in behalf of the defendant; that your oratrix sued out a writ of error from the Supreme Court of the State of Colorado to the District Court of the city and county of Denver, which writ of error was argued on the 18th day of January, 1915, in the Supreme Court of the State of Colorado and said writ of error was dismissed on the ground that your oratrix had failed to join as a party respondent, Benson, Smith & Company, Limited, therein, as will be seen from the judgment of that court, a copy of which is attached hereto and marked Exhibit "C."

XXI.

That prior to the time your oratrix brought said suit against the New York Life Insurance Company, respondent, in the District Court of the city and county of Denver, State of Colorado, to compel the said New York Life Insurance Company to pay to her the sum of Five Thousand Dollars ($5,000) with interest thereon, in accordance with the terms of said policy, she was a resident of the city and county of Denver, State of Colorado, and had been advised by her attorneys in said suit, that Benson, Smith & Company, Limited, were not a necessary party to the determination of said suit, and that an action in assumpsit against said New York Life Insurance Company in said court for the recovery of said Five Thousand Dollars ($5,000) and interest thereon, was

the proper and necessary action and, relying upon said advice, instituted said [11] suit in the District Court of the city and county of Denver, State of Colorado; that judgment of nonsuit was entered in said District Court of the city and county of Denver, State of Colorado, on the 21st day of January, 1913, and an appeal was taken from the judgment of said Court to the Supreme Court of Colorado, and said appeal was argued on the 22d day of October, 1914, before a division of said Supreme Court; said division failing to agree (standing two to one in favor of your oratrix), the case was reargued before said Court *en banc,* on the 18th day of January, 1915, and a decision rendered by said Supreme Court upholding the judgment of said District Court in granting a nonsuit; that shortly after the rendition of said final decision, your oratrix being advised of the fact that Benson, Smith & Company, Limited, was a necessary party, brought the within action and has ever since diligently prosecuted said action.

XXII.

And your oratrix further alleges that the said Benson, Smith & Company, Limited, respondent herein, now pretends and claims to be the beneficiary under the said policy, to be entitled to the proceeds thereof, and that it has paid certain premiums upon the said policy, and that the said George W. Smith, President of the said Benson, Smith & Comany, Limited, required the said Samuel L. Rumsey to take out the said policy in favor of the said Benson, Smith & Company, Limited, so that the said corporation might, in case of the death of the said Samuel L. Rumsey, re-

ceive the proceeds of said policy and with such proceeds, purchase the said shares of stock in the said Benson, Smith & Company, Limited, which might be owned by the said Samuel L. Rumsey at the time of his death, and that the failure of the said Samuel L. Rumsey to take out the said policy would have been by the said George W. Smith, as owner and possessor of the majority of the stock in the said Benson, Smith & Company, Limited, considered as sufficient cause for the [12] removal of the said Samuel L. Rumsey from his office as Treasurer and as cause to dissolve and put an end to the connection of him, the said Samuel L. Rumsey, with the business of said Benson, Smith & Company, Limited, which said claims your petitioner denies, except that she has no information sufficient on which to form a belief as to whether or not Benson, Smith & Company, Limited, have paid certain premiums upon said policy or whether George W. Smith, President of Benson, Smith & Company, Limited, required the said Samuel L. Rumsey to take out said policy of insurance and, therefore, leaves respondent to its strict proof of same and, for that reason, denies the same.

XXIII.

And your oratrix further alleges that there is nothing in the charter of incorporation of Benson, Smith & Company, Limited, that permits or allows said corporation to gamble in insurance on human life, such as is now claimed as the reason, by the Benson, Smith & Company, Limited, and its majority stockholder, for withholding the policy on the life of her husband, the said Samuel L. Rumsey,

from your oratrix; that the said policy and the proceeds thereof are being wrongfully and illegally withheld from her, your oratrix, under said pretext and pretense.

XXIV.

And your oratrix further alleges that she has not sufficient knowledge and information on which to base her belief as to what premiums, if any, were paid by the said Benson, Smith & Company, Limited, or whether any premiums so paid by the said Benson, Smith & Company, Limited, on said policy were charged to the said Samuel L. Rumsey, as an officer and stockholder of the said Benson, Smith & Company, Limited, or whether any such premiums so paid have been repaid to the said Benson, Smith & Company, Limited, and as to all these matters, demands strict proof, but your oratrix is ready, willing and able to pay the said Benson, Smith & Company, Limited, [13] such premiums as may have been advanced by it upon said policy and not otherwise repaid to the said Benson, Smith & Company, Limited, which in equity and good conscience she ought to pay and, in all other respects, is ready and willing to do equity in the premises and she hereby tenders and offers to bring into court such sum as may be found due the said Benson, Smith & Company, Limited, upon the ascertainment thereof.

XXIV.

And your oratrix further alleges that, upon information and belief, the respondent, Benson, Smith & Company, Limited, brought suit on the 30th day of August, 1912, in the First Circuit Court of the Terri-

tory of Hawaii against the New York Life Insurance Company for the sum of Five Thousand Dollars ($5,000), being the same money due under the policy set forth herein, and that said cause was tried, jury waived, on the 1st day of December, 1912, and judgment rendered in favor of the said Benson, Smith & Company, Limited, and against the said respondent, New York Life Insurance Company; that your oratrix had no notice of said suit nor was she joined as a party thereto, nor were her interests decided thereby.

XXV.

And your oratrix further alleges that at all the times set forth in this complaint since the bringing of her suit in the District Court of the city and county of Denver she has not resided, and does not now reside, in the Territory of Hawaii, which fact was well known to the respondents herein; that the said Benson, Smith & Company, Limited, and the said New York Life Insurance Company, at the time said suit of Benson, Smith & Company, Limited, vs. New York Life Insurance Company was instituted in the First Circuit Court of the Territory of Hawaii, had knowledge of the claim of your oratrix, and that she had brought suit against the New York Life Insurance Company in the District Court of the city and county of Denver, State of Colorado, and that said suit was then [14] pending in said Court; that neither the said Benson, Smith & Company, Limited, or New York Life Insurance Company made any effort to have your oratrix appear in said suit of Benson, Smith & Company, Limited, vs. New York Life Insurance Company instituted in the First Circuit

Court of the Territory of Hawaii, but deliberately, wilfully and collusively kept the knowledge of the pendency of said action from your oratrix, in order that said Benson, Smith & Company, Limited, might obtain judgment against said New York Life Insurance Company for said Five Thousand Dollars ($5,000) and interest thereon, and thereby fraudulently prevent your oratrix from collecting said Five Thousand Dollars ($5,000) and interest thereon from the said New York Life Insurance Company, legally and equitably due and owing from said New York Life Insurance Company to your oratrix.

XXVI.

And your oratrix further alleges that she has no plain, adequate or speedy remedy at law, and is remediless except before this Honorable Court sitting as a Court of Equity.

WHEREFORE, your oratrix humbly prays:

1. That the respondents, the New York Life Insurance Company, a corporation, and Benson, Smith & Company, Limited, a corporation, be summoned to appear and a true and perfect answer make to this, her amended bill of complaint, answer under oath being expressly waived.

2. That policy No. 3442,989, issued by the New York Life Insurance Company on the life of the said Samuel L. Rumsey, on the 11th day of June, 1903, be reformed by declaring your oratrix the beneficiary under said policy;

3. That this court decree that Benson, Smith & Company, Limited, be declared the trustee of your oratrix in regard to policy No. 3,442,989, issued by

the New York Life Insurance [15] Company on the life of Samuel L. Rumsey, upon payment by her of any sum or sums of money which they may prove to have dispensed as premiums on said policy in and for her behalf;

4. That it be decreed that the New York Life Insurance Company, respondent herein, pay to your oratrix the sum of Five Thousand Dollars ($5,000) together with interest at seven per cent (7%) from the 27th day of July, 1910, this sum being the moneys due your oratrix under Life Insurance Policy No. 3,442,989 issued on the life of Samuel L. Rumsey by the New York Life Insurance Company;

5. And if your oratrix has not prayed for the proper relief, then your oratrix prays for such other and further relief as shall be just, meet and equitable in the premises, and your oratrix will ever pray.

EMMA FORSYTH RUMSEY.
By (S.) LORRIN ANDREWS,
Her Attorney.

Dated, Honolulu, T. H., May 31, A. D. 1916. [16]

Territory of Hawaii,
City and County of Honolulu,—ss.

Lorrin Andrews, being first duly sworn, deposes and says: That he is the attorney for the oratrix in the above-entitled action; that he is familiar with all of the facts alleged in the foregoing amended complaint and makes this verification for and on behalf of the said oratrix; that he has read the foregoing amended complaint and knows the contents thereof and that the same is true to the best of his knowledge, information and belief.

(S.) LORRIN ANDREWS.

Subscribed and sworn to before me this 31st day of May, A. D. 1916.

[Seal] (S.) JAS. K. JARRETT,

Notary Public, First Judicial Circuit, Territory of Hawaii. [17]

Exhibit "A."

3 442 989

APPLICATION TO THE NEW YORK LIFE INSURANCE COMPANY.

1. A. Name of the person applying for insurance. NOTE.—WRITE THE NAME IN FULL. SAMUEL LOUIS RUMSEY.
   B. Residence: State: Hawaii. County: Island of Oahu. Town: Honolulu. Street: Fort Str. No.: ——.
   C. Place of business—Name of Firm: Benson, Smith & Co.
   D. To what address shall notices of premium be sent? Benson Smith & Co. Ltd., Honolulu, Hawaii.
2. A. Present occupation: Treasurer. Benson, Smith & Co. Ltd.
   C. State your exact duties in full: Usual duties of Corporation Treasurer.
   D. Are you married? No.
3. A. Place of birth: Goshen, N. Y.
   B. Race or Nationality: American.
   C. Born on 9 day of Sept. 1854.
   D. Age nearest birthday: 49.
4. A. Are you now insured in any Company or Society? (Answer "Yes" or "No.") No.

B. If so, state in what Companies or Societies, and the amount insured in each.

C. Have you an application now pending in any company or society? No.

D. If so, give name of Company or Society.

5. A. Has any Company or Society ever declined to issue a policy on your life? No.

B. If so, state name of Company or Society.

6. A. Has any Company or Society ever issued, or offered to issue, a policy on your life differing from the one then applied for? No.

B. If so, state name of Company or Society and give particulars. [18]

7. A. To whom is the insurance applied for to be payable in event of death?

NOTE.—GIVE CHRISTIAN NAMES IN FULL.

*To the firm of Benson, Smith & Co. Ltd. or its legal reps.

B. Present residence: Honolulu.

C. Relationship to you.

8. Do you wish to reserve the right to change the beneficiary at any time, if not then assigned? Yes.

9 A. Do you wish an Accumulation Policy as set forth in that policy-form of the Company? A. Yes.

B. If so, which Accumulation period do you select? B. I select the 15 year Accumulation Period.

---

*In pencil.

10. A. Do you desire a policy with "Premium-Return" in case of death within the Accumulation period? A. No.

B. If so, is such return to be equal to one-half, or all, the premiums paid? B. Premium-Return to be equal to ——— the premiums paid.

11. Sum to be insured, $5,000.

Premiums payable, (Annually. ~~Semi-Annually.~~ ~~Quarterly.~~

On what table? (Ordinary Life, ~~Life Premiums~~ ~~Endowment payable in 15 years.~~

NOTE.—Strike out the rates and plans not desired.

I agree, on behalf of myself and of any person who shall have or claim any interest in any policy issued under this application, as follows: 1. That inasmuch as only the officers at the Home Office of the Company in the City of New York have authority to determine whether or not a policy shall issue on any application, no statements, promises or information made or given by, or to, the person soliciting or taking this application for a policy, or by or to any other person, shall be binding on the Company or in any manner affect its rights, unless such statements, promises or information be reduced to writing, and presented to the officers of the Company, at the Home Office, in this application. 2. That in any distribution of surplus or apportionment of profits, the prin-

ciples and methods which may be adopted by the Company for such distribution or apportionment, and its determination of the amount equitable, belonging to any policy which may be issued under this application, shall be conclusive upon the Insured under said policy [19] and upon all parties having or claiming any interest thereunder. 3. That the insurance under any policy issued on this application shall take effect as of the date of this application, unless otherwise agreed in writing. 4. That any payment in advance on account of premium shall be binding on the Company only in accordance with the agent's or cashier's receipt therefor on the Company's authorized form. 5. That any policy that may be issued in pursuance of this application shall be in consideration of my promises made in this application.

Dated at Honolulu this 11th day of June, 1903.

Signature of the person applying for insurance.
(Write the name in full.)

SAMUEL LOUIS RUMSEY,

Witnessed by (S.) W. A. PURDY, Agent.

Other Agents,

SAN FRANCISCO CLEARING OFFICE.

Names and Residence of three intimate friends. (Dr. C. B. WOOD, Honolulu.
(Dr. C. B. COOPER, "
(H. E. COOPER, "

STATEMENT TO BE SIGNED BY APPLICANT UPON PAYMENT OF THE PREMIUM OR ANY PART THEREOF.

Dated at ———, 1903.

I HEREBY DECLARE that I have paid to..... .....Dollars in cash, and that I hold his receipt for same.

(Signature of Applicant) .....

RECEIVED from.....at.....State of..... this.....day of.....1903, the sum..... Dollars, the sum declared by applicant in his application to have been paid in cash, on the following conditions and agreements: [20]

FIRST. That if a policy be issued on the application for insurance made by the above this day to the NEW YORK LIFE INSURANCE COMPANY, corresponding in date and number with this receipt, said Company shall accept this receipt as cash towards payment of the first premium on the said policy.

SECOND. That this receipt will not be valid if issued for any sum in excess of the sum declared by applicant in such application to have been paid; it will not be valid if issued after JUNE 30, 1903; it will not be valid if erasures or additions have been made in the printed form; and it will not be valid unless the person to whom it is issued is promptly examined by a regularly appointed Examiner of the NEW YORK LIFE INSURANCE COMPANY.

THIRD.—That if a policy be not issued on said application and examination within sixty days from date (and only in that event), said sum will be re-

turned on surrender of this receipt to the Company.

FOURTH. That the liability of the Company under this receipt shall not exceed the sum declared by the applicant in his application to have been paid, and that this receipt is non-negotiable and cannot be assigned or transferred.

(Agent must sign here)————————————,

Agent. [21]

Exhibit "B."

NEW YORK LIFE INSURANCE COMPANY

Agrees to pay Five Thousand Dollars, to the firm of Benson, Smith and Co. Ltd. or its legal representatives or to such Beneficiary as may have been duly designated, at the Home Office of the Company, in the City of New York, immediately upon receipt and approval of proofs of the death of Samuel L. Rumsey, the Insured, of Honolulu, in the Island of Oahu, Hawaii.

CHANGE OF BENEFICIARY.—The Insured, having reserved the right, may change the Beneficiary or Beneficiaries at any time during the continuance of this Policy, by written notice to the Company at the Home Office, provided this policy is not then assigned. The Insured may at any time, by written notice to the Company at the Home Office, declare any Beneficiary then named to be an Absolute Beneficiary under this Policy. No designation, or change of Beneficiary, or declaration of an Absolute Beneficiary, shall take effect until endorsed on this Policy by the Company at the Home Office. During the lifetime of any Absolute Beneficiary the right to revoke

or change the interest of that Beneficiary will not exist in the Insured. If any Beneficiary, or Absolute Beneficiary, dies before the Insured, the interest of such Beneficiary will become payable to the executors, Administrators or Assigns of the Insured.

THIS POLICY participates in the Profits of the Company as herein provided.

If the Insured is living on the Eleventh day of June, Nineteen Hundred and Eighteen, which is the end of the Fifteen Year Accumulation Period of this Policy, and if the premiums have been duly paid to that date, and not otherwise, the Company will then apportion to this Policy its share of the accumulated Profits and the Insured shall then have the option of one of the following

Six Accumulation Benefits:

(1) Receive the Profits, in Cash, and continue this Policy, by payment of the same premium as previously; or,

(2) Receive the Profits, converted into an Annual Income for Life, and continue this policy by payment of the same premium as previously; or [22]

(3) Receive the profits, converted into Additional Paid-Up Insurance, subject to evidence of insurability satisfactory to the Company, and continue this Policy by payment of the same premium as previously; or,

(4) Receive the Entire Cash Value, as stated below, converted into an Annual Income for Life, and discontinue this Policy; or,

(5) Receive the Entire Cash Value, as stated below, in Cash, and discontinue this Policy; or

(6) Receive the Entire Cash Value, as stated below, converted into Paid-Up Insurance payable at death, and discontinue this Policy.

THE COMPANY WILL SEND TO THE INSURED, not less than two months before the end of the Accumulation Period, a written statement of the results under the six Accumulation Benefits. If the Company does not receive from the Insured a selection of one of these Benefits prior to the end of the Accumulation Period, or within one month thereafter, it is agreed that the Profits then apportioned to this Policy shall be converted into an Annual Income for Life, as provided in the second Benefit.

THE COMPANY GUARANTEES that the Entire Cash Value of this Policy at the end of the Accumulation Period

shall be (Eighteen hundred and thirty-five (Dollars, in Cash, and this Policy's (share of the Accumulated Profits (then apportioned, also in Cash.

(902–160. O. L.)

CASH LOANS AVAILABLE ON DEMAND.

THE INSURED CAN OBTAIN CASH LOANS ON THE SOLE SECURITY OF THIS POLICY on demand at any time after this Policy has been in force two full years, if premiums have been duly paid to the anniversary of the Insurance next succeeding the date when the Loan is made. Application for any Loan must be made in writing to the

Home [23] Office of the company, and the Loan will be subject to the terms of the Company's loan agreement. The amount of Loan available at any time is stated in Column 1 below, and includes any previous Loan then unpaid. Interest will be at the rate of five per cent per annum in advance.

TABLE OF CASH LOANS AND OF PAID-UP OR CONTINUED INSURANCE.

The Cash Loans and Paid-up Insurance stated below apply to a Policy of $1,000; and this Policy being for $5000, the cash Loan (Col. 1) or Paid-Up Insurance (Col. 2) available in any year will be Five times the amount stated in the table below for that year.

AFTER APPLICATION OF	Column 1. CASH LOANS	Column 2. PAID-UP INSURANCE.	Column 3. $5000—INSURANCE CONTINUED FOR	
			Years	Months
1 Year	$ None	$ None	$ None	0 2
2 Years		$ 63.00	$ 57.00	1 5
3 "		$ 85.00	$ 113.00	2 10
4 "		$ 112.00	$ 152.00	4 0
5 "		$ 143.00	$ 190.00	5 3
6 "		$ 167.00	$ 223.00	5 11
7 "		$ 192.00	$ 257.00	6 6
8 "		$ 217.00	$ 289.00	6 11
9 "		$ 242.00	$ 321.00	7 3
10 "		$ 267.00	$ 361.00	7 7
11 "		$ 293.00	$ 391.00	7 9
12 "		$ 318.00	$ 421.00	7 11
13 "		$ 342.00	$ 449.00	8 0
14 "		$ 367.00	$ 476.00	8 0
*15 "		$ 392.00	$ 516.00	8 0
16 "		$ 416.00	$ 542.00	8 0
17 "		$ 440.00	$ 567.00	7 11
18 "		$ 463.00	$ 591.00	7 10
19 "		$ 486.00	$ 614.00	7 9
20 "		$ 509.00	$ 635.00	7 7
21 "		$ 531.00	$ 656.00	7 5
22 "		$ 553.00	$ 675.00	7 3
23 "		$ 574.00	$ 695.00	7 1
24 "		$ 595.00	$ 713.00	6 10
25 "		$ 615.00	$ 730.00	6 8
26 "		$ 635.00	$ 745.00	6 6
27 "		$ 655.00	$ 761.00	6 3
28 "		$ 674.00	$ 776.00	6 0
29 "		$ 693.00	$ 791.00	5 9
30 "		$ 712.00	$ 805.00	5 6

*The Accumulation Period of this Policy ends with this Insurance [24] year. For Benefits at the end of Accumulation Period, see first page. O. L. 49–100–A.

INSTALLMENT BENEFITS.—The insured may change the mode of payment of the proceeds of this Policy as a death-claim from payment in one sum, as provided in the first page hereof, to payment by Annual Installments, as provided on the fourth page hereof.

THIS POLICY IS AUTOMATICALLY NON-FORFEITABLE FROM DATE OF ISSUE AS FOLLOWS:

FIRST.—If any premium is not paid on the date when due, and *if there is no indebtedness to the Company,* the Insurance will automatically continue from such date as Term Insurance for the amount stated at the head of Column 3 of the table on the second page hereof, for the term specified therein, and no longer.

In lieu of such automatic Term Insurance, on the Insured's written request therefor within six months from the date to which premiums were paid, this Policy will be endorsed for the amount of Paid-Up insurance specified in Column 2 of said Table.

SECOND.—If any premium or interest is not paid on the date when due, and *if there is an indebtedness to the Company,* Insurance for the net amount that would have been payable as a death-claim on the date to which premiums were paid, will automatically continue from such date as Term Insurance for such time as any excess of the reserve held by the Company under this Policy over such indebtedness will purchase at the then age of the Insured according to the Company's present published table of single premiums for Term Insurance, and no longer.

In lieu of such automatic Term Insurance, on the Insured's written request therefor within six months from the date to which premiums were paid, this Policy will be endorsed for such amount of Paid-up Insurance as said excess of the reserve will purchase at the then age of the Insured, according to the Company's present published table of single premiums.

The Automatic Term Insurance or the Paid-up Insurance specified above shall be payable at the same time and under the same [25] conditions as this Policy, but without participation in profits, cash loans or further payment of premiums.

REINSTATEMENT.—While the Insurance under this Policy will automatically continue as herein provided if any premium or interest is not paid on the date when due, the Company will restore the Policy as of the date of such non-payment, on payment by the Insured of such premium or interest within one month thereafter, with interest at the rate of five per cent per annum; or, the Company will restore the Policy as of the date of such non-payment at any time after one month and within the Accumulation Period, under the following conditions; written application to the Home Office with evidence of insurability satisfactory to the Company; payment of a sum equal to all the premiums that would have fallen due had all such premiums been paid on the dates when due up to the time of reinstatement together with interest thereon at the rate of five per cent per annum, and the payment of any loans unpaid when the automatic Term Insurance began, with interest; except, that within the last two years of the Accumulation Period

this Policy will not be restored if it has been continued as automatic Term Insurance for a period of more than three years.

PROFITS AFTER ACCUMULATION PERIOD.—If this policy is continued beyond the Accumulation Period, with payment of premiums, Profits shall be apportioned at the end of every five years thereafter during the continuance of the Policy.

GENERAL PROVISIONS.—(1) Only the President, a Vice-President, the Actuary, or the Secretary has power in behalf of the Company to make or modify this or any contract of Insurance or to extend the time for paying any premium, and the Company shall not be bound by any promise or representation heretofore or hereafter given by any person other than the above. (2) Premiums are due and payable at the Home Office, unless otherwise agreed in writing, and may be paid to an agent producing receipts signed by one of the above-named officers and countersigned by the agent. If any premium is not paid on or before the date when due, the liability of the Company shall be only as hereinbefore provided, for such case. (3) If the age of the insured is incorrectly stated, the amount payable under this Policy shall be the Insurance which the actual premium paid would have purchased at the true age of the insured. Age will be admitted on satisfactory proof. (4) In any distribution of surplus or apportionment of Profits, the principles and methods which may be adopted by the Company for such distribution or apportionment and its determination of the amount equitably belonging to this Policy shall be conclusive

upon the Insured and upon all parties having or claiming any interest under this Policy. (5) Any indebtedness to the Company including any balance of the premium for the Insurance year remaining unpaid, will be deducted in any settlement of this Policy, or of any Benefit thereunder. (6) Any assignment of this Policy must be made in duplicate and both sent to the Home Office, one to be retained by the Company and the other to be returned. The Company has no responsibility for the validity of any assignment.

THIS POLICY IS ABSOLUTELY FREE OF CONDITIONS AS TO RESIDENCE, OCCUPATION, TRAVEL, HABITS OF LIFE, AND MANNER, TIME OR PLACE OF [26] DEATH. NO PERMIT OR EXTRA PREMIUM WILL BE REQUIRED FOR MILITARY OR NAVAL SERVICE IN TIME OF WAR OR IN TIME OF PEACE.

THIS POLICY IS UNCONTESTABLE.

The insurance under this Policy takes effect as of the Eleventh day of June, Nineteen Hundred and Three, and the Insurance year, the Accumulation Period, and the loan and non-forfeiture provisions all relate back to that date.

THIS AGREEMENT IS MAKE IN CONSIDERATION of the sum of Two hundred and thirty-two dollars and thirty Cents, the receipt of which is hereby acknowledged, constituting payment for the period terminating on the Eleventh day of June, Nineteen Hundred and four, and in further consideration of the payment of a like sum on said date,

and thereafter on the Eleventh day of June in every year during the continuance of this Policy.

IN WITNESS WHEREOF THE NEW YORK LIFE INSURANCE COMPANY has caused this Agreement to be signed by its President and Secretary, and countersigned by its Registrar or Assistant Registrar.

(S.) JOHN A. McCALL,
President.

(S.) CHAS. C. WHITNEY,
Secretary.

(S.) WM. W. CERNEN,
Registrar.

Examined (S.) JGS. [27]

INSTALLMENT BENEFITS.

The Insured may change the mode of payment of the proceeds of this Policy as a death-claim, at any time within five years from date of issue, if not then assigned, from payment in one sum, as provided on the first page, to payment by annual instalments, as stated below, provided the amount of such proceeds is One Thousand Dollars, or more. If the amount is less than One Thousand Dollars, the proceeds will be paid in one sum only.

The following tables are based upon a Policy, the proceeds of which are One Thousand Dollars, and will apply *pro rata* to this Policy.

LIMITED INSTALMENTS.

Annual Instalments limited to the number stated below; any number from two to twenty-five may be selected by the Insured.

Number of Instalments..	25	20	19	18	17	16	15	14	13
Amount of each instalment.....	$56	$65	$67	$70	$73	$77	$81	$85	$91

Number of Instalments..	12	11	10	9	8	7	6	5
Amount of each instalment.....	$97	$104	$113	$124	$138	$155	$179	$211

Number of Instalments..	4	3	2
Amount of each instalment.....	$261	$343	$507

°ILLUSTRATION.—The amount of each Instalment will be $65 for each $1,000 of proceeds, if payment is to be made by 20 instalments.

CONTINUOUS INSTALLMENTS.

Annual Instalments *to continue during entire lifetime of* Beneficiary, but Twenty-five annual Instalments at least to be paid.

(Payment by Continuous Instalments cannot be selected if there is more than one Beneficiary under this Policy.) [28]

Age of Beneficiary at Death of Insured	15 or under	16	17	18	19	20	21	22	23
Amount of each Instalment	$40	$40	$40	$40	$40	$41	$41	$41	$41

Age of Beneficiary at Death of Insured	24	25	26	27	28	29	30	31	32
Amount of each Instalment	$41	$42	$42	$42	$43	$43	$43	$44	$44

Age of Beneficiary at Death of Insured	33	34	35	36	37	38	39	40	41
Amount of each Instalment	$44	$45	$45	$46	$46	$47	$47	$48	$48

Age of Beneficiary at Death of Insured	42	43	44	45	46	47	48	49	50
Amount of each Instalment	$48	$49	$49	$50	$50	$51	$51	$52	$52

Age of Beneficiary at Death of Insured	51	52	53	54	55	56	57	58	59
Amount of each Instalment	$52	$53	$53	$53	$54	$54	$54	$54	$55

Age of Beneficiary at Death of Insured	60	61	62	63	64 or over
Amount of each Instalment	$55	$55	$55	$55	$55.

°ILLUSTRATION.—The amount of each annual Instalment will be $43 for each $1,000 of proceeds, if at the death of the Insured the Beneficiary should be 30 years of age last birthday. [29]

The Insured, having changed the mode of payment to annual Instalments, may at any time subsequently change the number of Instalments, as may be desired, and as above illustrated, or entirely revoke any change, thereby making the proceeds of this Policy again payable in one sum.

The payment of the first Instalment shall be made immediately upon receipt and approval of proofs of the death of the Insured, and subsequent Instalments shall be paid annually thereafter.

If the Beneficiary should die before all Instalments have been duly paid, the remainder of the Instalments shall be paid thereafter to the Executors, Administrators or Assigns of the Beneficiary.

Each change of mode of payment or revocation of any change, must be requested by the Insured in Writing, and shall not take effect until endorsed on this Policy by the Company at the Home Office.

The Beneficiary can neither assign nor commute unpaid Instalments, unless such right is given to the Beneficiary by the Insured in writing, and is endorsed on this Policy by the Company at the Home Office, during the life-time of the Insured. [30]

REGISTER OF CHANGE OF MODE OF PAYMENT OF PROCEEDS OF THIS POLICY AS A DEATH CLAIM.

NOTE.—Changes of mode of payment and revocation of any change must be requested in writing and shall not take effect until endorsed on this Policy by the Company at the Home Office.

Date Endorsed.	How Payable.	Endorsed By.

REGISTER OF CHANGE OF BENEFICIARY.

NOTE.—No notice of Change of Beneficiary or declaration of the Absolute Beneficiary shall take effect until endorsed on this Policy by the Company at the Home Office.

NEW YORK LIFE
INSURANCE COMPANY.
Samuel L. Rumsey,

No. 3442989,
Age 49. Amount $5000.
——— Annual Premium $232.30.

Notice: It is not necessary for the Insured or the Beneficiary to employ the agency of any person, firm or corporation, in collecting the insurance under this Policy, or in receiving any of its Benefits. Time and expense will be saved by writing direct to the Home Office, 346 and 348 Broadway, New York City.

902–160.
Ordinary Life—Accumulation.
Instalment Option. [32]

Exhibit "C."

8010.

EMMA FORSYTH RUMSEY,
Plaintiff in Error,
vs.
NEW YORK LIFE INSURANCE COMPANY,
Defendant in Error.

ERROR TO THE DISTRICT COURT OF THE CITY AND COUNTY OF DENVER.

JUDGMENT AFFIRMED.

Honorable JAMES H. TELLER, Judge.

Mr. T. J. O'DONNELL, Mr. JOHN W. GRAHAM, Mr. CANTON O'DONNELL, Attorneys for Plaintiff in Error.

Mr. CHARLES W. WATERMAN, Mr. WILLIAM A. JACKSON, Mr. JAMES H. McINTOSH, Of Counsel, Attorneys for Defendant in Error.

Mr. Justice HILL delivered the opinion of the Court: [33]

This action was instituted by the plaintiff in error, to recover $5,000 with interest, being the amount alleged to be due her, upon an insurance policy issued by the defendant company upon the life of Samuel L. Rumsey, who departed this life at Los Angeles, California, on the 27th day of July, 1910, at which time it is alleged that the plaintiff in error was the beneficiary of this policy by virtue of a change in the beneficiary made on or about the 10th day of June, 1907. The answer, among other things, denies, that any change of beneficiary had ever been made, and that the defendant is liable to a suit by the original beneficiary. Trial was to the court. At the close of the plaintiff's case, a motion for nonsuit was sustained.

The policy states it was issued upon the life of Samuel L. Rumsey, the insured, of Honolulu, etc., and was to take effect June 11th, 1903. The beneficiary therein named was Benson, Smith & Company, Limited, or its legal representatives. The clause pertaining to a change of beneficiary reads:

> "The Insured, having reserved the right, may change the Beneficiary, or Beneficiaries, at any time during the continuance of this Policy, by written notice to the Company at the Home Office, provided this Policy, is not then assigned. The Insured may at any time, by written notice to the Company at the Home Office, declare any Beneficiary then named to be an Absolute Beneficiary under this Policy. No designation, or

change of Beneficiary, or declaration of an Absolute Beneficiary, shall take effect until endorsed on this Policy, by the Company at the Home Office. During the lifetime of an Absolute Beneficiary the right to revoke or change the interest of that Beneficiary will not exist in the Insured. If any Beneficiary or Absolute Beneficiary, dies before the Insured, the interest of such Beneficiary will become payable to the Executors, Administrators or Assigns of the Insured."

There also appears in or on the policy the following: [34]

"REGISTER OF CHANGE OF BENEFICIARY. NOTE.—No notice of Change of Beneficiary or declaration of the Absolute Beneficiary shall take effect until endorsed on this Policy by the Company at the Home Office."

If we understand plaintiff's counsel correctly, they urge three reasons why a nonsuit should not have been granted.

First. Because the evidence establishes that a change of beneficiary had been made substantially as the policy requires. An insurance policy, like any other written instrument, is to be considered as a whole. The parts concerning the change of beneficiary must be likewise thus considered. That portion which provides that no change shall take effect until endorsed on the policy, by the company, at the Home Office, is entitled to the same consideration as any other portion pertaining to such change. It stands admitted that no change of beneficiary was

ever endorsed on this policy, by the company, at the Home Office or elsewhere, and that it was never presented to the company at its Home Office, or elsewhere, for this purpose. It, therefore, follows that there had not been a change of beneficiary perfected and fully completed in the manner provided by the policy.

Second. It is claimed, that a change of beneficiary had been made as provided in the policy, with the exception of its endorsement on the policy at the Home Office; that this requirement is solely for the protection of the company; that the company has waived it, hence, no former beneficiary or other person has any right to complain. Defendant's counsel challenge the correctness of the assumption that the clause in the policy providing that no change of beneficiary shall take effect until endorsed on the policy, by the company, at the Home Office, is inserted solely for the protection of the company, or that it can waive it without [35] the consent of the then designated beneficiary, so as to effect the right of such beneficiary. They call our attention to the opinions of this court in Johnson v. New York Life Co., 56 Colo. 178; Finnell v. Franklin, 55 Colo. 156, and Rollins v. McHatton, 16 Colo. 203, in which they claim it is held, in substances, that the beneficiary of an insurance policy, which allows a change of beneficiary, has a contingent vested right in the policy, which is subject to be divested only in accordance with the provisions of the contract, for which reason, they urge, it being admitted that no endorsement of such change was ever made upon the policy,

that even though it were held that the company had waived this provision, it would avail nothing as against the rights of the original beneficiary. They contend further that the proof does not sustain the assumption that the company ever waived this provision. If correct in their second contention, it is unnecessary to consider the first.

The evidence concerning the change of beneficiary and the alleged waiver by the company consists of the written instrument calling for the change and certain correspondence between counsel for the plaintiff, who was also counsel for the insured and the insurance company. This correspondence extended over a period of about three years. It would accomplish no good purpose to insert it in an opinion. A careful study of it leads to no other conclusion than that it fails to disclose any waiver by the company, but to the contrary it discloses that the company, at all times, insisted that this requirement be complied with. If the question of waiver involved the keeping of the policy alive upon [36] account of the alleged tender and receipt by the company of the payment of one premium by counsel, it would then present an entirely different aspect and a large number of cases cited by plaintiff would be in point.

The third reason urged why the nonsuit was wrong seeks to invoke the equitable rule of substitution. The difficulty with counsel's position in this respect is not in the rule which is generally recognized and frequently applied, but in its application under the record as here presented. It is urged that the in-

sured in good faith attempted to secure the policy in order to have the change of beneficiary endorsed as provided therein, but was wrongfully denied possession by Benson, Smith & Company and thereby prevented from so doing by circumstances over which he had no control, for which reason equity should step in and treat the substitution as complete. To sustain this contention, we would have to hold that the policy had been wrongfully withheld from the insured by Benson, Smith & Company, and for that reason the substitution should be treated as complete. This includes a finding that in equity Benson, Smith & Company, had ceased to be the beneficiary and this without their being made a party to the action. It stands admitted by the pleadings that the policy is in their possession and that they were and are designated in it as the beneficiary. Under such circumstances, we do not think that their equities in the matter, and their right as a beneficiary, can be determined under the equitable rule of substitution in an action to which they are not a party. This identical question was passed upon in Mahr v. N. U. F. Insurance Society, 127 N. Y. 452, where the plaintiff brought his action as the equitable owner [37] of a fire insurance policy. The company plead a defect of parties defendant in that Kelley, of Iowa, who had possession of the policy under an assignment, had not been joined. The Court sustained this contention. The claim was made there as here, that it was impossible to bring him into that court. In answer the Court said, "The object of the action was to establish the equitable title of the plaintiff to the

policy, etc. The company should not be required to pay the entire amount of the policy both to the plaintiff and to Kelly, or, without fault on its part, be placed in a position where it would run any reasonable risk of being compelled to make a double payment, etc. The general rule in equity requires that the persons interested in the subject of the action should be made parties, etc., not only all persons whose rights may be affected by the judgment should be brought into court, but all those whose presence is essential to the protection of any party to the action, etc.; where there are conflicting claimants to the same obligation, each insisting upon it as exclusively his own, all should be made parties before the question of title is determined by the court of equity in favor of either against the one from whom the obligation is due. Otherwise, payment or performance may be exacted as many times as there are separate claimants." We think this equitable rule is specially applicable here, for the reason that so far as the equities of the plaintiff are concerned, they depend upon the wrongful detention of the policy by Benson, Smith & Company. In this the insurance company can have no particular interest. It is not claimed that the policy was not in force at the time [38] of the death of Mrs. Rumsey, ordinarily it is immaterial to an insurance company to whom the policy is paid, and such would appear to be the facts here, but they do have an interest in not being placed in a position where they might be required to pay the amount of the policy to both claimants where the rights of the plaintiff are equitable. It follows that

the presence of Benson, Smith and Company is essential to the protection of the insurance company. The plaintiff did not make them a party, and when the question was properly presented by answer she did not then ask that they be brought in as provided by the Code. The Court did not, of its own motion, make such an order, evidently for the reason which appears to be conceded, that they were residents of Honolulu, and jurisdiction over them could not be secured except by their consent and there is nothing to disclose that the plaintiff sought to secure it, but the fact of their being nonresidents does not change the rule. As stated, in substance, in the New York case, *supra,* "the burden is on the plaintiff to secure the presence of such persons in the court of his selection, 'otherwise if he cannot do this, we see no alternative for him than that he bring a suit in a court which will have jurisdiction over them. This equitable rule seems to be recognized in New York Life Insurance Company v. Smith, 67 Fed. 694, relied upon by plaintiff as holding differently in any action at law. We have no criticism as to the ruling in that case, but do not think it applicable to the facts here. The trial Court heard the plaintiff upon her law case, as did the Federal Court in the Smith case, in which no equities were involved. The conclusions here reached do not [39] prohibit the plaintiff from instituting an action against Benson, Smith and Company and the insurance company in order to have the rights of both alleged beneficiaries determined and the insurance paid to whomsoever is entitled to it.

Counsel make the further contention that Benson, Smith and Company had no insurable interest in the life of the insured and that it is against public policy to allow them, or it, as the case may be, to become the owner of insurance on his life. They have cited numerous authorities upon this subject. There is no such an issue involved in this case, and certainly it could not be decided in an action to which Benson, Smith and Company were not a party.

In view of further litigation over the proceeds of this policy, we deem it proper to state as this trial took place before Rule IX of this court concerning nonsuits became effective, that this action does not come under this rule.

The judgment is affirmed.

Affirmed.

Decision *en banc.*

Mr. Justice SCOTT dissents.

Mr. Justice TELLER not participating. [40]

DISSENTING OPINION.

SCOTT, J.—There is no question in this case as to the validity of the policy, nor as to the liability of the defendant under it for the full amount named therein. The only question for determination is as to whether or not there was a change of beneficiary such as will permit the plaintiff to recover.

There is no admission in the pleadings, and no testimony to show that Benson & Co., the beneficiary named in the policy, has other or different rights, or can be regarded in any other or different light, than any beneficiary who may have been so named.

Therefore, we are to determine, as the sole question, whether or not the insured, by his acts and conduct, effected a change of beneficiary in substantial compliance with his rights under its terms, and whether there was such shortcoming of which the defendant company may complain that will defeat recovery by the plaintiff.

It is admitted that the defendant company did not indorse on the policy the fact of change of beneficiary. Counsel for defendant contend that the action is one at law, and not in equity, and that for such reason we may not consider the equities of the parties, and, further, that authorities which may support the contentions of the plaintiff as being founded in equity are not to be accepted as authority in this case. I cannot accept this contention. It is true that the action is primarily upon a written contract, but there is no dispute as to the liability of the defendant under that contract, and the sole question at issue is as to whether the plaintiff is entitled to recover under it, and this presents a question in equity which was sufficiently pleaded.

By the first section of our Code, distinction between actions at law and suits in equity are abolished, and we are left but one form of civil action for the enforcement or protection of private [41] rights, and the redress or prevention of private wrongs. It has been held that under our practice, legal and equitable relief may be had in the same action, as the nature and cause of the action may require; the only prerequisite being that, in order that equitable relief may be had, equitable pleadings must be interposed.

Home Ins. Co. v. Railroad Co., 19 Colo. 46, 34 Pac. 281.

The clause in the policy relating to change of beneficiary, in so far as important to consider, is:

> "The insured, having reserved the right, may change the beneficiary, or beneficiaries, at any time during the continuance of this policy, by written notice to the company at the home office, provided this policy is not then assigned. The Insured may at any time, by written notice to the company at the home office, declare any beneficiary then named to be an absolute beneficiary under this policy. No designation, or change of beneficiary, or declaration of an absolute beneficiary, shall take effect until indorsed on this policy by the company at the home office."

The duly executed change of beneficiary by the insured upon a form provided and furnished by the defendant company was filed with it at the home office, and noted on the records of the company in July, 1907, and so remained on the file until the death of the insured, July 27, 1910. The only uncompleted requirement was that this change of beneficiary was not indorsed on the policy by the company at its home office. The reason assigned for the failure of the company to so indorse is that the insured did not forward the policy to the company for such indorsement. It is clear that this was prevented by the act of the Benson Company alone, which company, it is admitted in the pleadings, was in possession of the policy, and refused and continued to refuse to deliver such policy either to Rumsey, the

insured, or to the insurance company, for the purpose of such indorsement. This appears from the undenied allegation of the plaintiff in her verified pleadings. In the following language:

> "This plaintiff, and as well the said Samuel L. Rumsey, about the month of August, 1907, and at divers times thereafter gave notice to said Benson Company not to pay any further [42] premiums upon the said policy, and that the said Samuel L. Rumsey had, pursuant to the right to him in the said policy reserved, changed the beneficiary and designated the plaintiff as beneficiary, and that no right of the said corporation in the said policy or the proceeds thereof was or would be recognized by him, the said Samuel L. Rumsey, or by this plaintiff, except the right to be repaid such premiums as the said corporation had theretofore paid upon the said policy, and which had not otherwise been paid by the said Samuel L. Rumsey, all of which said premiums the said Samuel L. Rumsey then and there offered to pay to the said corporation, and the plaintiff and the said Samuel L. Rumsey then and there demanded of the said corporation that it deliver said policy to him, the said Samuel L. Rumsey, but the said Benson Company failed and refused so to do, and that, if the said change of beneficiary so made by the said Samuel L. Rumsey was never indorsed upon the said policy, the same was not so indorsed because of the failure and refusal of the said Benson Company to deliver the said policy to this plaintiff or to the

said Samuel L. Rumsey, or to the said defendant company, for the purpose of having the said indorsement made, and the said Benson Company caused the said supposed failure to secure, or make, or have made, the said indorsement by its own wrongful act, and cannot be heard to take advantage thereof."

This is confirmed by the allegation of the defendant company contained in its answer:

"That the said policy of insurance so issued as aforesaid upon the life of the said Samuel L. Rumsey has been ever since its issuance, and still is, claimed and owned by, and within the actual possession of, the Benson Company."

Then the failure to have the change of beneficiary indorsed on the policy was the result alone of the wilful act of the Benson Company. If this act was wrongful, can the defendant now be heard to say that by reason thereof it may defeat the claim of the plaintiff, upon the ground that there was no change of beneficiary, for the sole reason that such change was not indorsed on the policy.

As a beneficiary simply, the Benson Company had no right to possession of the policy as against the will of the insured and owner thereof. Then by what other right did it retain possession so as to prevent an exercise of the express right of the plaintiff to change the beneficiary at any time he might so determine? The policy had not been assigned to such corporation. It had not been deposited with it as security for any debt of the insured or otherwise. [43] The Benson Company had not been declared the ab-

solute beneficiary. The contract of insurance was solely between Rumsey and the insurance company, with the reserved exclusive right to him to change the beneficiary at any time. The policy contained no reference to the Benson Company, save that it was made the beneficiary therein, subject to such absolute and reserved right of the insured to change such beneficiary at any time, the exercise of which right required neither the consent of the Benson Company nor of the insurance company. No such claim to possession of the policy can be sustained upon the mere fact that Rumsey was a stockholder and officer of the Benson corporation.

The only other pretense of right to possession of the policy by the Benson Company is the following allegation in the defendant's answer:

> "That on the said 11th day of June, A. D. 1903, the said Smith, the said Rumsey, and the said Gignoux each made application to the defendant for insurance in the sum of $5,000 each upon their respective lives, for the use and benefit of the Benson Company, and for the protection of the interest of the Benson Company on their respective lives as officers and stockholders of the Benson Company. That, thereafter, and based upon said several applications for insurance, this defendant issued and delivered a policy of insurance upon the life of each of the said three last-named persons respectively each policy for the sum of $5,000 in each of which policies the Benson Company was and still is designated and specified as the beneficiary thereof, which said

policies were respectively numbered as follows, to wit: George W. Smith, 3442990; Samuel L. Rumsey, 3442989; Alexis J. Gignoux, 3443679. That the Benson Company paid the initial premium upon each of said policies, and has paid each and every annual premium upon each of said policies annually ever since, and as the same became due and payable."

This allegation, except in so far as it recites that two other persons who were stockholders in the Benson Company secured policies as individuals in the same company and at the same time, is expressly denied. The defendant offered no proof, and therefore in this case as tried the allegation is without support, and must be considered as though not made. But, if there was justification in the fact for what is thus alleged, it furnishes no basis for a [44] right of possession of the policy itself, or any title in or to it.

There is no allegation that Rumsey made any contract or agreement with the Benson corporation in that respect. It is simply said that the three stockholders, including Rumsey, took out the policies for the benefit of the company. Assuming this to be true, no consideration for such action is alleged, either as between them, or as between themselves and the Benson corporation. At most, it was an individual voluntary act, subject to revocation by either party at any time. But the contract here is one between Rumsey, the insured, and the insurance company, and any private outside agreement between a number of policy holders as individuals as to who should be the beneficiary in each policy at the time

could not abridge the contract right of each contained in the policy to at any time change his beneficiary. If it be true that each applied for and received a like policy from the same company, then each knew that his interests, if he had any, were subject to the terms of the policy.

It is also alleged by the defendant that the Benson Company paid the initial and other premium payments on the Rumsey policy. But it is plain that at least since 1907 these payments were over the protest of Rumsey, and that tender was made of any sums so paid at the time of the demand for possession of the policy. If the Benson Company had any claim in this respect, it was not such as to entitle that company to possession of the Rumsey policy, and particularly where offer of payment of any such sum was made. Besides, any such payment of premium was a matter as between that company and Rumsey, and is no defense in this case. But a private corporation of the character of the Benson Company cannot be presumed to have such incidental power as will enable it to pay insurance premiums upon the insurance policies of its shareholders, and no special or specific powers are pleaded. Victor v. Mills, Wilson, and Traveler's Ins. Co., 148 N. C. 107, 61 S. E. 648, 16 [45] L. R. A. (N. S.) 1020, 16 Ann. Cas. 291. The withholding of possession of the Rumsey policy by the Benson Company was clearly wrongful.

> "A policy of insurance does not create a vested interest in the beneficiary during the lifetime of the insured when, by the terms of the policy, the insured reserved the right to change the benefi-

ciary. Under such a provision, the right of the beneficiary vests conditionally, not absolutely; and the insured, without the knowledge or consent of the beneficiary, may designate another, for the reason that the rights of the person named in the policy as beneficiary are subject to be defeated by the terms of the contract naming him as such. In other words, this is a condition of the contract, and his right is therefore subject to it."

Hopkins v. N. W. Ins. Co., 99 Fed. 40 C. C. A. 1; Mut. Life Ins. Co. v. Twyman, 122 Ky. 513, 92 S. W. 335, 97 S. W. 391, 121 Am. St. Rep. 471; Hopkins v. Hopkins, 92 Ky. 324, 17 S. W. 864; Atl. M. L. I. Co. v. Gannon, 179 Mass. 291, 60 N. E. 933; Martin v. Stubbings, 126 Ill. 387, 18 N. E. 657, 9 Am. St. Rep. 620; Delaney v. Delaney, 175 Ill. 187, 51 N. E. 961; Splawn v. Chew, 60 Tex. 532; Fuos v. Dietrich (Tex. Civ. App.), 101 S. W. 291; McNeil v. Chinn, 45 Tex. Civ. App. 551, 101 S. W. 465; Knights of Honor v. Watson, 64 N. H. 517, 15 Atl. 125.

The right of the insured to the possession of such a policy as the one in question has been recognized by our courts.

It was said in Denver Life Ins. Co. v. Crane, 19 Colo. App. 191, 73 Pac. 875:

"The policy provided, in explicit language, that the insured might, without the plaintiff's consent, diminish the amount of the insurance or appoint another beneficiary in her place. She therefore had no vested interest, but only an ex-

pectancy, which might at any time be defeated by the act of her husband. His control over the policy, subject to its terms, was as complete as if he had been himself the beneficiary."

The doctrine that equity aids in an attempted, but uncompleted, change of beneficiary has been repeatedly recognized by this court and the Court of Appeals. It was said in Rollins v. McHatton, 16 Colo. 203, 27 Pac. 254, 25 Am. St. Rep. 260:

"If the assured had done his part towards perfecting the substitution in accordance with the method prescribed, but, owing to circumstances over which he has no control, the change is not entirely consummated at the time of his death, equity will sometimes treat the substitution as complete. Bacon's Benefit Societies, etc., Sections 309, 310, and cases. But it is an essential prerequisite to the interposition of equity that the assured has in good faith attempted to comply with the prescribed mode of substitution." [46]

This principle was accepted in Johnson v. New York Life Ins. Co., 56 Colo. 178, 138 Pac. 414, where it was said:

"The complaint fails to allege a sufficient attempt on the part of the insured to make a change of the beneficiary in the manner provided, or that he was prevented from doing so by the happening of that over which he had no control. What it alleges on this subject in the way of an excuse was pure neglect upon his part, and nothing more. These alleged excuses dis-

close that he was aware of the conditions prescribed in the policy by which a change of beneficiary could be made. Regardless of this, he made no reasonable effort to have the beneficiary changed in the manner prescribed in the policy."

Considering a policy with like provisions for change of beneficiary as in this case, and where the insured, two days before his death directed a change in beneficiary and mailed the policy with notice of change to the home office of the company, and where the insured died before the notice reached the company, it was held in Mutual Life Co. v. Lowther, 22 Colo. App. 622, 126 Pac. 882, that the change of beneficiary was in substantial conformity with the terms of the policy. It was there said:

"The clause in the policy 'such change shall take effect upon the indorsement of the same on the policy by the company,' in view of the entire paragraph in which it is found, does not suggest to our mind a condition precedent to the consummation of the change of beneficiary, but, rather, a provision for protection against such possible oral or other changes by the insured of which the company has not received notice. In such case this clause would protect the company against liability as between contesting beneficiaries for the fund. The first change received and indorsed by it would be upheld, and the record thus made would likewise protect the true beneficiary and give effect to the insured's wishes."

In this case Rumsey did all that he could to effect the change of beneficiary, as indicated by the execu-

tion and delivery to the company of such change of beneficiary, and by correspondence covering a period of more than three years before his death; and it is clear that the indorsement on the policy was prevented solely by the wrongful act of the Benson Company.

The original beneficiary in whose possession the certificate is cannot defeat the change by refusing to surrender the certificate. [47] Cooley's Briefs on Insurance, 3770; Delaney v. Delaney, 175 Ill. 187, 51 N. E. 961, affirming 70 Ill. App. 130; Allgemeiner Arbeiter Bund v. Adamson, 132 Mich. 86, 92 N. W. 785; Lahey v. Lahey, 174 N. Y. 146, 66 N. E. 670, 61 L. R. A. 791, 95 Am. St. Rep. 554, affirming 66 App. Div. 623, 73 N. Y. Supp. 1138; Cade v. Head Camp Pac. Jurisdiction Woodmen of the World, 27 Wash. 218, 67 Pac. 603.

The provision in the policy cannot require an impossibility on the part of the insured. Isgrigg v. Schooley, 125 Ind. 94, 25 N. E. 151. In such a case equity will aid the substituted beneficiary, and regard that as done which ought to have been done. Jory v. Supreme Council, A. L. H., 105 Cal. 20, 38 Pac. 524, 26 L. R. A. 733, 45 Am. St. Rep. 17; Lahey v. Lahey, 174 N. Y. 146, 66 N. E. 670, 61 L. R. A. 791, 95 Am. St. Rep. 554.

The plaintiff in error contends that the defendant company by its acts in accepting the payment of the last premium to become due, before the death of Rumsey, and in accepting and noting on its records, and retaining the executed change of beneficiary, has waived its right to complain as to the want of actual

indorsement of such change upon the policy. While this matter is extensively argued and earnestly urged, I do not consider it necessary to discuss or determine that question, preferring to rest my opinion upon the conclusion that there was a substantial compliance with the terms of the policy under the facts of this case.

In the brief of the defendant in error, filed after the oral argument, it is urged that the plaintiff did not plead or prove that the policy was not assigned at the time of the execution and delivery to the company of the notice and change of beneficiary. The record shows that this question was not raised in the court below, and was not presented in the original briefs, and for such reason is not properly here for consideration. But such an allegation would be purely negative, and is a matter of defense. [48] It cannot be presumed that there was an assignment of the policy. Besides, the policy contains the provision relating to assignment that:

> "Any assignment of this policy must be made in duplicate and both sent to the home office, one to be retained by the company and the other to be returned. The company has no responsibility for the validity of an assignment."

In addition to this, the defendant alleges in its answer that the policy was issued for the benefit of the Benson Company, and has been in its possession since that time. If, then, there has been a valid assignment of the policy, such fact was peculiarly within the knowledge of the defendant company, and it was its duty to plead it. It might be said with equal con-

sistency that the policy provides for the declaration of an absolute beneficiary, and therefore, and for such reason, it was incumbent on the plaintiff to plead that there had been no such declaration.

It is further contended by the defendant in error that there is a distinction in the rules of law as between fraternal or mutual and ordinary life companies, as applicable to change of beneficiary. It may be regarded as settled in this jurisdiction that there is no such distinction. Johnson v. New York Life, *supra*. It is also urged that it is vitally necessary that the original beneficiary named in the policy be made a party to the action, in order that the defendant insurance company may be protected against a double liability. It appears that the original beneficiary in this case made no proof of death, brought no suit to enforce its claims, nor has it made any other effort to protect any such claim. It is also alleged in defendant's answer that the Benson Company refuses to interplead in this case. This refusal implies knowledge of the pendency of the suit, and a declination to assert its claim. The claim of the plaintiff is a direct one against the defendant, and this claim is well sustained, and is exclusive. [49]

There can be neither reason nor justice under this state of facts in denying to the plaintiff the right to have her cause determined in this jurisdiction, upon the ground that she is powerless to bring into a court a party residing in a foreign jurisdiction, or, on the other hand, to send her to the Hawaiian Islands to assert her rights as against the defendant, when such

party, through the assertion of the defendant only, claims an interest in the matter litigated.

A similar claim as to necessary parties was made in the case of New York Life Ins. Co. v. Smith, 67 Fed. 694, 14 C. C. A. 635, and the facts in this case seem to make the language of the Court in that case entirely applicable, wherein it was said:

> "It is earnestly argued by the plaintiff in error that J. B. Murphy is an indispensable party as a defendant, and that this action cannot be maintained without his being made a party, and that, in the event that he could not be brought within the jurisdiction of the court, the action should be dismissed. *Ergo,* if this position is sound, the same objection could be made to any action brought by Murphy, and the insurance company would go scot-free, and obtain a judgment in both cases for its costs. Nevertheless, if the law casts upon the defendant in error the burden of procuring the presence of Murphy, it would be her misfortune if she has not or could not do so. We are of opinion that the law imposes upon her no such burden."

It must be assumed that the defendant has set up in its answer every right that the Benson Company may claim in the premises, and it is plain upon this hearing that such company has no right, but, on the contrary, that upon the state of facts presented the cause is one solely between the plaintiff and defendant, and this is clearly within section 16 of the Code.

The objection as to defect of parties was not raised in the trial court, either by demurrer or answer, nor

was it suggested as a ground of the motion for a nonsuit. The written opinion of the trial Court discloses that the point was neither raised nor considered in that court. For such reasons the defendant has waived that question, and it cannot be considered by this Court for the [50] *for the* first time. Under our Code, and under the settled rule of courts, a defect of parties plaintiff or defendant is waived unless the objection is urged by demurrer, if the defect appears upon the face of the complaint, or by plea or answer where the defect does not so appear. Sections 55, 56, and 57, Civil Code; 31 Cyc. 738; Gutheil Park Inv. Co. v. Montclair, 32 Colo. 420, 76 Pac. 1050; Medano Ditch Co. v. Adams, 29 Colo. 317, 68 Pac. 431; Farncomb v. Stern, 18 Colo. 279, 32 Pac. 612; Abbott v. Yuma Co., 18 Colo. 6, 30 Pac. 1031; Melsheimer v. Hommel, 15 Colo. 475, 24 Pac. 1079; Fitzgerald v. Burke, 14 Colo. 559, 23 Pac. 993; Great West Min. Co. v. Woodmas of Alston Min. Co., 12 Colo. 46, 20 Pac. 771, 13 Am. St. Rep. 204; Cowell v. South Denver Real Estate Co., 16 Colo. App. 108, 63 Pac. 991; Wilson v. Welch, 8 Colo. App. 210, 46 Pac. 106; Union Pac. etc. R. Co. v. Perkins, 7 Colo. App. 184, 42 Pac. 1047; Poundstone v. Maben, 5 Colo. App. 70, 37 Pac. 37; Poundstone v. Holt, 5 Colo. App. 66, 37 Pac. 35; Simonton v. Rohm, 14 Colo. 51, 23 Pac. 86.

The facts of this case as admitted and proven do not bring it within the exception to the rule thus stated, for the court can justly proceed to a judgment without the presence of the Benson Company. Under the law as here announced, the requirements of

the policy were substantially and sufficiently complied with, and the plaintiff alone is entitled to recover, notwithstanding the fact that the Benson Company was the original beneficiary, or because of other claims of the company as recited in the answer, even though all of such be admitted to be true. The granting of the relief prayed for, therefore, does not prejudice the rights of the Benson Company, for its alleged claim or right can be as [51] completely determined without its presence as with it. It had no vested or acquired rights in the policy as against the will and the acts of the insured, and these were sufficiently exercised, to make the plaintiff the sole party in interest as a beneficiary. The exception to the rule stated is announced in 31 Cyc. 742, and has been considered in Peck v. Peck, 33 Colo. 421, 80 Pac. 1063, and in Colorado State Bank v. Davidson, 7 Colo. App. 91, 42 Pac. 687.

If we were to admit that the policy was taken by Rumsey for the benefit of the Benson Company, and that, under an agreement between Smith, Gignoux, and Rumsey, each took out a like policy for the benefit of that company, there still remained the absolute right of each to change his beneficiary in the same manner, and whenever at his will he might elect to do so. The substituted beneficiary is not, and cannot be, bound by any such prior agreement, either verbal or written, between the three policy holders.

If recovery is had at all, it must be under the terms of the contract between the insured and the insurance company. It would be a singular state of the law if insurance companies should find their rights, duties

and obligations dependent upon outside agreements as between policy holders. The insured under the policy, had the unrestricted right: (1) To assign his policy, which he did not do; and (2) to change his beneficiary, which we find he sufficiently did do. There can be no valid right upon the part of the original beneficiary, or the insurance company, to question the unqualified and unrestricted exercise of either of these rights, if in substantial compliance with the terms of the policy. Then, it is folly to say in this case that the Benson Company is an indespensable party to the suit; for it can assert no other claim in this action than that which has been considered. [52]

Admitting, further, that the Benson Company has paid all the premiums upon the policy: Such, if true, was the voluntary act of that corporation, for which it can have no other claim than against the estate of Rumsey or from the proceeds of the policy. Certainly, the insurance company cannot be held or bound by such conduct and to so hold the substituted beneficiary would be for the Court to write a new contract for the parties. The proceeds of an insurance policy belong to the beneficiary under it, regardless of how or from whom the money was obtained with which to pay the premiums.

I think the judgment should be reversed, with instructions to the Court to enter judgment for the plaintiff in accordance with the prayer of the complaint.

[Endorsement]: Eq. No. 1993. Reg. 2, pg. 242. E. No. 1993. Circuit Court First Circuit, Territory

of Hawaii. Emma Forsyth Rumsey, Petitioner, vs. New York Life Insurance Co., a Corporation, Respondents. Amended Bill of Complaint. Filed June 13, 1916, at 55 minutes past 3 o'clock P. M. (S.) J. A. Dominis, Clerk. Lorrin Andrews, Honolulu, T. H., Attorney for Petitioner.

Due service of the within and foregoing Amended Bill of Complaint, by copy thereof, is hereby acknowledged, this 9th day of June, 1916.

(S.) THOMPSON, MILVERTON & CATHCART,

M.

Attorneys for Respondent, New York Life Insurance Company.

(S.) HOLMES and OLSON,

Attorneys for Respondent, Benson, Smith & Company, Limited. [53]

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

AT CHAMBERS—IN EQUITY.

EMMA FORSYTH RUMSEY,

Petitioner,

vs.

NEW YORK LIFE INSURANCE COMPANY, a Corporation, and BENSON, SMITH & COMPANY, LIMITED, a Corporation,

Respondents.

Demurrer of Respondent New York Life Insurance Company to Amended Bill of Complaint.

Now comes New York Life Insurance Company, one of the respondents above named, by protestation, not confessing all or any of the matters or things in the amended bill of complaint of the above-named petitioner contained to be true in such manner and from as the same are therein set forth and alleged, and demurs to such amended bill of complaint, upon the following grounds and for the following reasons, to wit:

I.

Because it appears by said amended bill of complaint *of complaint* that by laches and by lapse of time since the alleged rights of Samuel L. Rumsey, late husband of the said petitioner, and the alleged rights of said petitioner accrued, as set forth in said amended bill of complaint, the right of the said Samuel L. Rumsey and of the said petitioner, to recover possession of the policy of insurance referred to in said amended bill of complaint became barred prior to the institution of this suit in equity. [54]

II.

Because it appears by said amended bill of complaint that by laches and by lapse of time since the alleged rights of the said Samuel L. Rumsey, late husband of the said petitioner, and the said petitioner, accrued as set forth in said amended bill of complaint, the right of the said Samuel L. Rumsey and of the said petitoner, to have the Court decree that said policy of insurance be re-

formed by declaring the said petitioner the beneficiary under said policy of insurance and that the said New York Life Insurance Company pay to the said petitioner the sum of Five Thousand Dollars ($5,000.00) and interest, became barred prior to the institution of this suit in equity.

Sept. 6. 1916 (S.) J. C. C. Clerk.

III.

Because it appears by said amended bill of complaint that by laches and by lapse of time since the alleged rights of said Samuel L. Rumsey and of said petitioner accrued, as set forth in said amended bill of complaint, the right of the said Samuel L. Rumsey and of the said petitioner, to a decree that the said Benson, Smith & Company, Limited, is the trustee of the said petitioner in regard to said policy of insurance became barred prior to the institution of this suit in equity.

IV.

Because it does not appear by said amended bill of complaint that the said respondent, New York Life Insurance Company, is a necessary or proper party to said cause.

V.

Because it appears by said amended bill of complaint that the said respondent, New York Life Insurance Company, is not a necessary or proper party to said cause.

VI.

Because there is a misjoinder of parties respondent in said cause in that it does not appear by said amended bill of complaint [55] that the said re-

spondent, New York Life Insurance Company, has done any act or thing, either acting alone or in conjunction with the said respondent, Benson, Smith & Company, Limited, in the matter of withholding the said policy of insurance from the said petitioner or from the said Samuel L. Rumsey, or in the matter of the detention thereof.

VII.

Because it appears by said amended bill of complaint that the same is exhibited against this respondent, New York Life Insurance Company, and against said respondent, Benson, Smith & Company, Limited, for distinct matters and causes, in several whereof, as appears by the said amended bill, this respondent, New York Life Insurance Company, is not in any manner interested or concerned, and that the said amended bill of complaint is altogether multifarious in that it purports to set out an alleged cause of action against respondent, New York Life Insurance Company, for the reformation of said policy of insurance by declaring said petitioner the beneficiary under said policy, as well as an alleged cause of action against respondent, Benson, Smith & Company, Limited, for the declaring of the said Benson, Smith & Company, Limited, Trustee of said petitioner in regard to said policy of insurance, as well as an alleged cause of action against respondent Benson, Smith & Company, Limited, for the possession of said policy of insurance, and as well as an alleged cause of action against respondent, New York Life Insurance Company, for the recovery of the sum of Five Thousand Dollars

($5,000) with interest, alleged to be due said petitioner under said policy of life insurance.

VIII.

Because said amended bill of complaint does not state facts [56] sufficient to constitute a cause of complaint in equity against respondent, New York Life Insurance Company.

IX.

Because said amended bill of complaint does not state facts sufficient to warrant the granting of the relief prayed for therein or any relief whatsoever in a court of equity against the said respondent, New York Life Insurance Company.

WHEREFORE, and for divers other good causes of demurrer appearing in the said amended bill of complaint, respondent, New York Life Insurance Company, demands the judgment of this Honorable Court whether it shall be compelled to make any further or other answer to said amended bill of complaint, and prays to be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

Dated at Honolulu, this 22d day of July, A. D. 1916.

NEW YORK LIFE INSURANCE COMPANY.

By THOMPSON, MILVERTON & CATHCART,

FWM.,

Its Attorneys.

CERTIFICATE.

I, Fred W. Milverton, do hereby certify that I am a member of the firm of Thompson, Milverton, &

Cathcart, attorneys for New York Life Insurance Company, one of the respondents in the above-entitled cause, and I further certify that the foregoing demurrer is not intended for delay.

(S.) FRED W. MILVERTON, [57]

Due service, by copy, of the within demurrer of respondent, New York Life Insurance Co., to amended bill of complaint is hereby admitted.

(S.) ANDREWS & PITTMAN,
Attorneys for Petitioner,
Honolulu, Hawaii.
July 22d, 1916.

(S.) HOLMES & OLSON,
Attys. for Benson, Smith & Co., Ld.

[Endorsed]: E. No. 1993. R. 2/242. In the Circuit Court of the First Judicial Circuit, Territory of Hawaii. Emma Forsyth Rumsey, Petitioner, vs. New York Life Insurance Co., a Corporation, and Benson, Smith & Company, Limited, a Corporation, Respondents. Demurrer of Respondent, New York Life Insurance Company, to Amended Bill of Complaint. Filed at 11:40 A. M., July 22, 1916. (S.) Henry Smith, Clerk. Thompson, Milverton & Cathcart, Attorneys at Law, Rooms 2–12 Campbell Block, Honolulu, Hawaii, Attorneys for New York Life Insurance Co. [58]

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

AT CHAMBERS—IN EQUITY.

EMMA FORSYTH RUMSEY,

Petitioner,

vs.

NEW YORK LIFE INSURANCE COMPANY, a Corporation, and BENSON, SMITH & COMPANY, LIMITED, a Corporation,

Respondents.

Demurrer of Benson, Smith and Company, Limited, to Amended Bill of Complaint.

Now comes Benson, Smith & Company, Limited, one of the respondents above named, by protestation, not confessing all or any of the matters or things in the amended bill of complaint of the above-named petitioner contained to be true in manner or form as the same are therein set forth and alleged, and demurs to such amended bill of complaint upon the following grounds and for the following reasons, to wit:

1. Because it appears by said amended bill of complaint thay by laches and by lapse of time since the alleged rights of Samuel L. Rumsey, late husband of the said petitioner, and the alleged rights of the said petitioner accrued, as set forth in said amended bill of complaint, the right of said Samuel L. Rumsey and of the said petitioner to recover possession of the policy of insurance referred to in said amended bill of complaint became barred prior to the institution of this suit in equity.

2. Because it appears by said amended bill of complaint that by laches and by lapse of time since the alleged rights of the said [59] Samuel L. Rumsey, late husband of the said petitioner, and the said petitioner accrued, as set forth in said amended bill of complaint, the right of the said Samuel L. Rumsey and of the said petitioner to have the Court decree that said policy of insurance be reformed by declaring the said petitioner a beneficiary under said policy of insurance became barred prior to the institution of this suit in equity.

3. Because it appears by said amended bill of complaint thay by laches and by lapse of time since the alleged rights of said Samuel L. Rumsey and of said petitioner accrued, as set forth in said amended bill of complaint, the right of the said Samuel L. Rumsey and of the said petitioner to a decree, that the said Benson, Smith & Company, Limited, is a trustee of the said petitioner in regard to the policy of insurance, became barred prior to the institution of this suit in equity.

4. Because it appears by said amended bill of complaint that the same is exhibited against this respondent, Benson, Smith & Company, Limited, and against said respondent, New York Life Insurance Company, for distinct matters and causes, and that the said amended bill of complaint is altogether multifarious in that it purports to set out an alleged cause of action against the respondent New York Life Insurance Company, for reformation of said policy of insurance by declaring said petitioner the beneficiary under said policy, as well as an alleged

cause of action against this respondent, Benson, Smith & Company, Limited, for the declaring of the said Benson, Smith & Company, Limited, trustee of said petitioner in regard to said policy of insurance, as well as an alleged cause of action against this respondent, Benson, Smith & Company, Limited, for the possession of said policy of insurance, as well as an alleged cause of action against respondent, the New York Life Insurance Company, for the recovery [60] of the sum of Five Thousand Dollars ($5,000), with interest alleged to be due said petitioner on said policy of life insurance.

5. Because said amended bill of complaint does not state facts sufficient to constitute a cause of complaint in equity against this respondent, Benson, Smith & Company, Limited.

6. Because said amended bill of complaint does not state facts sufficient to warrant the granting of the relief prayed for therein, or any relief in a court of equity against this respondent, Benson, Smith & Company, Limited.

WHEREFORE, and for divers other good causes of demurrer, as appears in said amended bill of complaint, this respondent, Benson, Smith & Company, Limited, demands the judgment of this Honorable Court whether it shall be compelled to make any further or other answer to said amended bill of complaint, and prays to be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

Dated, Honolulu, T. H., August 1st, 1916.

BENSON, SMITH & COMPANY, LIMITED,

By (S.) HOLMES & OLSON,
Its Attorneys.

I, Clarence H. Olson, do hereby certify that I am a member of the firm of Holmes & Olson, attorneys for Benson, Smith & Company, Limited, one of the respondents in the above-entitled cause; and I further certify that the foregoing demurrer is not intended for delay.

(S.) C. H. OLSON. [61]

[Endorsed]: E. 1993. Reg. 2, pg. 242. In the Circuit Court of the First Judicial Circuit, Territory of Hawaii. At Chambers. In Equity. Emma Forsyth Rumsey, Petitioner, vs. New York Life Insurance Company, a Corporation, and Benson, Smith & Company, Limited, a Corporation Respondents. Demurrer of Benson, Smith & Company, Limited, to Amended Bill of Complaint. Filed at 3:38 o'clock P. M., August 1st, 1916. (S.) B. N. Kahalepuna, Clerk. Holmes & Olson, 863 Kaahumanu St., Honolulu, Attorneys for Benson, Smith & Company, Limited. [62]

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

IN EQUITY.

EMMA FORSYTH RUMSEY,

Petitioner,

vs.

NEW YORK LIFE INSURANCE COMPANY, a Corporation, and BENSON, SMITH & COMPANY, LIMITED, a Corporation,

Respondents.

Separate Answer of the Above-named Respondent, New York Life Insurance Company, to the Amended Bill of Complaint of the Above-named Petitioner.

This respondent, New York Life Insurance Company, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties, and imperfections in said amended bill of complaint, contained, for answer thereto or to so much thereof as this respondent is advised it is material or necessary for it to make answer to, answering saith:

I.

This respondent admits that the petitioner is the widow of Samuel L. Rumsey, formerly a resident of Honolulu, who died on the 27th day of July, 1910.

II.

This respondent admits that it is a corporation or-

ganized under the laws of the State of New York for the purpose of insuring lives and was, and is, duly authorized to and engaged in its said business in the Territory of Hawaii. [63]

III.

This respondent has no knowledge or means of information as to whether or not said respondent, Benson, Smith & Company, Limited, is or was a corporation incorporated under the laws of the Territory of Hawaii, or if incorporated the purposes for which said respondent is or was incorporated, and therefore leaves said petitioner to such proof of the allegations of said amended bill of complaint in that behalf as it may be advised upon the trial hereof is material.

IV.

This respondent admits that on the 11th day of June, 1903, said Samuel L. Rumsey was a resident of Honolulu, Territory of Hawaii; denies that on or about said date he filed an application at Honolulu, Territory of Hawaii, with the agent of the New York Life Insurance Company representing said corporation in the Territory of Hawaii, for the purpose of having issued a certain policy upon his life; denies that he made application to said New York Life Insurance Company at Honolulu aforesaid for said policy of life insurance; denies that this respondent issued to said Samuel L. Rumsey a policy upon his life; denies that it delivered or caused the same to be delivered to him at Honolulu or elsewhere, but in that behalf alleges that on, to wit, the 11th day of June, 1903, one W. A. Purdy was a special agent

of this respondent authorized by it to solicit applications for insurance and was compensated by a commission on the first premium on policies the applications for which were solicited by him, provided such policies became contracts and the premium was paid, and that on, to wit, the 11th day of June, 1903, said Samuel Lewis Rumsey, at the solicitation of the said Purdy there and then signed an application to this respondent for $5,000 insurance on his life, and alleges that it was understood and agreed in and by [64] said application that only the officers of this respondent at its Home Office which was and is in the city of New York, in the State of New York, had authority to pass on said application and issue a policy and that the same should be transmitted by mail to said Home Office for said purpose. Admits that this respondent thereafter issued said policy as applied for but denies that it issued the same to said Samuel L. Rumsey, and denies that it delivered or caused the same to be delivered to said Samuel L. Rumsey, and in that behalf alleges that this respondent does not know and has no means of knowing as to whether or not at the time of issuing said policy there was no such firm or corporation as the firm of Benson, Smith & Company, Limited, but in that behalf alleges that in due course of mail after the 11th day of June, 1903, said respondent received at its Home Office, in the City of New York, three several like applications for insurance, which was solicited by said special agent Purdy, each dated the 11th day of June, 1903, one made by one George Waterman Smith, another made by one Alexis J.

Gignoux, and the other was said application of said Samuel L. Rumsey, each for $5,000 insurance on the life of said respective applicants for the same kind of policy to be payable in the event of the death of the insured to said Benson, Smith & Company, Limited, and this respondent was there and then informed and believed, and alleges it to be true, that said three applicants were officers, members and owners of the said Benson, Smith & Company, Limited, and it was then and there represented to this respondent and it believed and alleges it to be true that said applicants for said insurance were taking out said insurance for the benefit of said Benson, Smith & Company, Limited, and it there and then duly accepted said several applications and made said three several policies of insurance as applied for accordingly; that said three several policies were [65] each of the same tenor and effect except as to the name of the applicant and of the insured, and were each and all payable to said Benson, Smith & Company, Limited, and contained the change of beneficiary clause which is set forth in the petitioner's amended bill of complaint.

This respondent there and then understood and believed, and the fact was, that said three applications for insurance and said three policy contracts were one and the same transaction, and that they were applied for and obtained by the said several persons interested as aforesaid in said Benson, Smith & Company, Limited, pursuant to a mutual agreement between them for said purpose and for the benefit of said Benson, Smith & Company, Limited;

and said policies were each made upon said several lives as aforesaid pursuant to such understanding, belief and agreement, and for the purpose of conforming thereto and carrying out the same; this respondent admits that the signatures to said policy were affixed in the city and State of New York.

V.

This respondent has no knowledge or information as to the exact character of the organization named Benson, Smith & Company, Limited, which was designated in said three policies as the beneficiary thereof, but in applying for said insurance and making said several policies it was the intention of each and all of the parties to said several contracts to make the same for the benefit of said organization known as Benson, Smith & Company, Limited, whatever the form or character of said organization was.

VI.

This respondent does not know and has no means of knowing what business said Benson, Smith & Company, Limited, was engaged in at the time of taking out said policy, or what business was stated in its charter of incorporation if it had a charter of [66] incorporation. It admits that said George W. Smith was President of said Benson, Smith & Company, Limited, and that said Samuel L. Rumsey, was the Treasurer thereof, and alleges that the said Alexis J. Gignoux was there and then the Secretary of said Benson, Smith & Company, Limited, and that said three applicants were the owners of the said Benson, Smith & Company, Limited. This respondent admits that said policy passed into the

possession of said Benson, Smith & Company, Limited, and that said Benson, Smith & Company, Limited, thereafter retained possession thereof.

VII.

This respondent has no knowledge or information as to the truth of the allegations contained in that paragraph of said amended bill of complaint which is numbered VII, and therefore leaves said petitioner to such proof thereof in that behalf as it may be advised on the trial hereof is material.

VIII.

This respondent has no knowledge or information as to the truth of the allegations contained in that paragraph of said amended bill of complaint which is numbered VIII, and therefore leaves said petitioner to such proof thereof in that behalf as it may be advised on the trial hereof is material.

IX.

This respondent has no knowledge or information as to the truth of the allegations contained in that paragraph of said amended bill of complaint which is numbered IX, and therefore leaves said petitioner to such proof thereof in that behalf as it may be advised on the trial hereof is material.

X.

This respondent has no knowledge or information as to the truth of the allegations contained in that paragraph of said amended bill of complaint which is numbered X, and therefore leaves [67] said petitioner to such proof of the allegations of said amended bill of complaint in that behalf as it may be advised upon the trial hereof is material, except

this respondent alleges that by the laws of the State of New York, where this respondent is, and always was, domiciled, and has, and always has had, its principal place of business, and where said policy was applied for and made, and pursuant to which said policy was issued and is to be construed and performed, one person may take out insurance on his own life and make the insurance payable to any person, partnership, corporation or other beneficiary whom he may name in the policy, and such beneficiary thereof need have no interest nor continue to have an interest in the life of the insured, as will more fully appear by the decision of the Court of Appeals in the State of New York, which is the highest court of said State, in the case of Olmsted v. Keyes, as the same is found and reported in Volume Number 85 of the New York Reports at page 593, which are the official reports of said court.

XI.

This respondent admits that said Rumsey filed with this respondent at its Home Office written request to change the beneficiary of said policy in substance and effect the same as that alleged copy thereof set forth in that paragraph of said amended bill of complaint which is numbered XI, and admits and alleges that said respondent received said request at its said Home Office on, to wit, the 13th day of July, 1907, but said policy did not accompany the same and was never received by this respondent, and further alleges that thereupon and on, to wit, the 19th day of July, 1907, in answer to the receipt of said request this respondent wrote to said in-

sured acknowledging receipt of said request and asking him to send this respondent the policy for the endorsement thereon of said change of beneficiary, but said [68] insured did not send, nor cause to be sent, said policy to this respondent although this respondent repeatedly requested him to do so; and thereupon and on or about the 5th day of October, 1907, said respondent threatened to return said request to change the beneficiary unless said policy was duly forwarded for the endorsement of said change thereon, and thereupon said insured on, to wit, the 17th day of October, 1907, through his lawyer, to wit, one T. J. O'Donnell, Esq., of Denver, Colorado, duly sent a letter to this respondent, in which he said—

> "Replying to yours of October 5th, 1907, we beg to state that we are anticipating advice from Honolulu complying with our request to return the policy so that it may be forwarded to you and the change in beneficiary made. Failing to receive the policy from Honolulu we shall take the necessary legal steps to secure its return.
>
> "We do not see why you should return the request for change of beneficiary nor do we see that the return of the same can change the legal rights of any of the parties, no more can the retention of the same by you."

—and thereafter on, to wit, the 25th day of October, 1907, said respondent duly sent said insured's said lawyer a letter in substance and effect as follows:

"Answering your letter of the 17th instant, we beg to state that we have as requested placed the insured's request for change of beneficiary on file, but beg to inform you that no change of beneficiary takes effect unless endorsed on the policy by the Company. We would therefore request that you forward the policy to us as soon as possible for the necessary endorsement."

But said policy was never forwarded to this respondent and said change of beneficiary never was endorsed thereon.

XII.

This respondent denies that it accepted or received from said petitioner as beneficiary under said policy or otherwise, the June 11th, 1910, premium on said policy, or any other premium or sum, and in that behalf alleges that on, to wit, the 11th day of June, 1910, said petitioner delivered to the person [69] in charge of respondent's local office in Denver, in the State of Colorado, the sum of $232.30, but said office did not receive nor accept said sum and had no power, authority or jurisdiction to receive or accept the same, which she there and then well knew, but as an accommodation to said petitioner, and not otherwise, said local office forwarded said sum to the Home Office of the respondent in the city of New York, where alone said premium was payable except to an agent holding this respondent's official receipt therefor, which said official receipt said Denver office did not hold and said official receipt for said premium was then in this respondent's office in Honolulu for the col-

lection of said premium, where said premium was there and then duly paid; this respondent refused to receive said sum and thereafter and on, to wit, the 25th day of July, 1910, said respondent duly tendered to said petitioner return thereof which she refused, and thereafter said respondent duly paid said sum into court in the suit in the State of Colorado, which she brought and prosecuted against this respondent, and which is hereinafter more fully described, and said sum so paid into court has been duly received, accepted and retained by her.

XIII.

This respondent admits it to be true that no designation of an absolute beneficiary under said policy ever was made, and it believes it to be true that no assignment thereof ever was made. It denies that said petitioner or said insured tendered to this respondent the premium on said policy for any year except as to the June, 1910, premium, which was returned to her in the manner hereinbefore stated.

XIV.

This respondent has no knowledge or means of information as to the truth of the allegations contained in that paragraph of [70] said amended bill of complaint which is numbered XIV, and therefore leaves said petitioner to such proof of the allegations of said amended bill of complaint in that behalf as it may be advised on trial hereof is material.

XV.

This respondent has no knowledge or means of information as to the truth of the allegations contained in that paragraph of said amended bill of complaint

which is numbered XV, and therefore leaves said petitioner to such proof of the allegations of said amended bill of complaint in that behalf as it may be advised on trial hereof is material.

XVI.

This respondent has no knowledge or means of information as to the truth of the allegations contained in that paragraph of said amended bill of complaint which is numbered XVI, and therefore leaves said petitioner to such proof of the allegations of said amended bill of complaint in that behalf as it may be advised on trial hereof is material, except this respondent denies that said Rumsey ever changed the name of the beneficiary in said policy and admits that no change of beneficiary ever was endorsed upon said policy.

XVII.

This respondent has no knowledge or means of information as to the truth of the allegations contained in that paragraph of said amended bill of complaint which is numbered XVII, and therefore leaves said petitioner to such proof of the allegations of said amended bill of complaint in that behalf as it may be advised on trial hereof is material, but this respondent alleges upon information and belief that all the premiums that were paid on said policy were paid by said Benson, Smith & Company, Limited, and that no premium thereon ever was paid either by said petitioner or [71] said insured.

XVIII.

This respondent admits that said Samuel L. Rum-

sey died on the 27th day of July, 1910, and that the petitioner was his lawful wife.

XIX.

This respondent admits that the petitioner made proofs of the death of said insured on forms furnished her by the respondent, but in that behalf this respondent alleges that said forms were furnished the petitioner on her application at her request, and for her accommodation, and in so furnishing them to her the respondent there and then advised her that a dispute existed in regard to the ownership of said policy and the right to the proceeds thereof, and that therefore in delivering said blanks this respondent reserved all its rights and gave no instructions in regard to the filing of claim, and there and then duly advised her that according to this respondent's records said policy provided for payment to Benson, Smith & Company, Limited, or its legal representative, and that the beneficiary named therein had not been changed.

Respondent denies that said petitioner became entitled to the payment of said $5,000, or any other sum, and admits that this respondent refused and still refuses to pay her said sum or any part thereof.

XX.

This respondent admits that on or about the 15th day of August, 1910, said petitioner brought suit against this respondent in the District Court in the city and county of Denver, State of Colorado, to recover from it the proceeds of said policy with interest thereon, and in that behalf alleges that process of summons was duly served on this respondent as

defendant in said suit in said [72] District Court, and this respondent as defendant therein duly filed its answer in which it set forth the facts about said policy and about said policies on the life of said Smith and said Gignoux, all as hereinbefore alleged, and therein denied that said petitioner had any right, title or interest in or to the proceeds of said insurance, or any part thereof, and having fully answered the plaintiff's complaint in said cause prayed to be hence dismissed with its costs. That the plaintiff in said suit duly replied to said defendant's said answer traversing and avoiding the allegations thereof, and upon the issue so joined a trial of the merits of said cause was duly had on, to wit, the 21st day of January, 1913, and as a result of said trial and at the conclusion thereof, the Court duly sustained the defendant's motion for a nonsuit on the ground that the plaintiff therein was not the beneficiary of said policy and not entitled to recover, and the Court there and then duly sustained said motion and entered judgment dismissing the plaintiff's complaint in said cause on its merits, the defendant to recover from the plaintiff therein its costs. It is true that said petitioner sued out a writ of error from the Supreme Court of the State of Colorado to said District Court of the city and county of Denver, and that said writ of error was duly argued in said Supreme Court, but this respondent denies that said writ of error was dismissed on the ground that said petitioner had failed to join as party respondents, said Benson, Smith & Company, Limited, but alleges that said Supreme Court entered judgment in said

cause therein affirming said judgment of said trial court on the ground "that there had not been a change of beneficiary perfected and fully completed in the manner provided by the policy" and on the further ground that this respondent had not by any of its acts waived any of the terms or conditions of the contracts, and said issue so joined in said suit and said judgment of said court on the [73] merits thereof constitutes a full and final adjudication as between said petitioner and this respondent of the merits of her said claim, which said judgment and adjudication are entitled to full faith and credit in this court. This respondent denies that Exhibit "C" attached to petitioner's amended bill of complaint is a copy of said judgment of said Supreme Court of Colorado.

XXI.

This respondent denies upon information and belief that said petitioner was a resident of the city and county of Denver in the State of Colorado when she commenced said suit against this respondent in said District Court, but alleges that she was there and then a resident of the State of California. This respondent does not know and has no means of knowing just what advice the petitioner's attorneys in said suit brought by her against this respondent, in said District Court, gave her, but alleges upon information and belief that at the time she commenced said suit and at all times thereafter said petitioner was well and fully advised of all the circumstances of the making of said policy as they are hereinbefore stated, and of said rights, interest and

claims of Benson, Smith & Company, Limited, with respect thereto, and that she wilfully ignored said Benson, Smith & Company, Limited, believing and expecting that by doing so she could compel this respondent to pay her the proceeds of said policy, leaving it to protect itself as best it could against said claims of Benson, Smith & Company, Limited, said petitioner little caring what trouble, cost or expense she unjustly and oppressively put this respondent to or whether it should be obliged to pay said policy more than once or not. This respondent at all times after receiving proof of the insured's death and down to the time of the first trial of said suit in the State of Colorado, held itself ready, willing and was able and offered to pay the proceeds of said policy to the [74] person justly and legally entitled thereto, and so advised said rival claimants to its proceeds and sought to induce them to enter some common jurisdiction where their said conflicting claims could be properly passed upon and adjudicated, the attitude of this respondent at all said times with respect to the proceeds of said policy being that of stakeholder, but said petitioner stubbornly refused to accede to this respondent's said reasonable request and insisted upon and forced this respondent much against its will and at great cost and expense into the trial of said cause, although it was alleged among other things in this respondent's said answer in said suit in Colorado, which said answer was filed December 29, 1910, as follows, to wit:

"That the said policy of insurance so issued as aforesaid upon the life of the said Samuel L.

Rumsey has been ever since its issuance, and still is, claimed and owned by, and within the actual possession of, the Benson Company, (which was the name by which said Benson, Smith & Company, Limited, was in said answer designated).

"That no change of the beneficiary named and designated in said policy of insurance last mentioned has ever at any time been made or endorsed upon said policy of insurance last mentioned by this defendant at its Home Office or elsewhere, and the Benson Company still remains the specified and designated beneficiary under said policy last mentioned. That the Benson Company has paid to this defendant each and every premium upon said policy last mentioned in the amount therein specified, annually, at or before the time required by said policy of insurance; and neither the said Samuel L. Rumsey nor the plaintiff has ever at any time paid any premium, or any part of any premium, for or on account of said policy of insurance upon the life of the said Samuel L. Rumsey.

"That the principal place of business of the Benson Company is at Honolulu, in the Territory of Hawaii, where the said Samuel L. Rumsey resided at the time of the issuance of the said policy of insurance upon his life, and that the Benson Company never has at any time transacted any business within the State of Colorado, and has not, and never has had since the commencement of this suit, any officer, stock-

holder, officer or agent within the territorial limits of the State of Colorado. That the Benson Company claims and maintains that it is now, and at all times has been, the designated beneficiary in the said policy of insurance upon the life of the said Samuel L. Rumsey, and claims to be the owner of the proceeds of said policy and of the policy itself, and threatens to commence suit at Honolulu, in the said Territory of Hawaii, against this defendant to recover the [75] contents of the said policy of insurance so issued as aforesaid upon the life of the said Samuel L. Rumsey, and refuses to interplead in this cause."

XXII.

This respondent further says that as soon as it was served with process of summons in said action brought by said petitioner as plaintiff against it in the District Court for the City and County of Denver, Colorado, this respondent duly and promptly notified said respondent, Benson, Smith & Company, Limited, of the pendency of said suit, and there and then duly invited said Benson, Smith & Company, Limited, to intervene therein and become a party thereto, or to take charge of the defense thereof for this respondent, or otherwise to assert its claim and protect its interests therein, and there and then duly authorized and requested said Benson, Smith & Company, Limited, to use the name of this defendant if it found it necessary or desirable to do so for said purpose, and signified its willingness and duly offered both to said Benson, Smith & Company,

Limited, and to said petitioner, to pay the amount of said insurance into said court or otherwise for the use and benefit of that one of said rival claimants finally found to be justly entitled thereto, and asked that this respondent might be treated as a stakeholder of said sum and that said parties would litigate said matter between themselves without involving this respondent in their said dispute or putting it to unnecessary trouble and expense and duly offered to do whatever else, if anything, it ought to do in order that it might safely discharge its said contract obligation without being in danger of having to discharge it a second time; but they each there and then, and at all times, failed and refused to comply with any such reasonable request, and on the contrary, said petitioner persisted in her said suit in Colorado and said Benson, Smith & Company, Limited, on, to wit, the 30th day of August, 1912, duly commenced a suit against this defendant in the Circuit Court of the First Judicial Circuit [76] of the Territory of Hawaii, therein and thereby seeking to recover from this defendant the proceeds of said insurance, and such proceedings were had in said Court that issues were duly joined, and after a trial of said cause on its merits, and on, to wit, the 8th day of February, 1913, judgment was duly entered therein for said plaintiff and against this respondent for the amount of said insurance with interest and costs in the full sum of $5,969.56, which this respondent on the 3d day of April, 1913, was compelled to, and did, duly pay.

XXIII.

This respondent denies that it deliberately, willfully or collusively, or otherwise, kept from said petitioner knowledge of the pendency of said action of said Benson, Smith & Company, Limited, against it and alleges that it had no power to bring her into said court in Hawaii, and that it would have been futile to undertake to serve her with notice of said suit for that this respondent long before the commencement of said suit of Benson, Smith & Company, Limited, against it, had repeatedly urged the said petitioner to enter some jurisdiction where all of said claimants could be brought in and their conflicting claims to the proceeds of said policy there duly adjudicated, and repeatedly urged upon said petitioner to make said Benson, Smith & Company, Limited, a party defendant to her said suit, and she failed and refused at all times to comply with any such request or to do any other thing than stubbornly to maintain and prosecute her said suit in said District Court in Colorado, in the hope and with the expectation that the Court would make this respondent pay her the proceeds of said policy whether said Benson, Smith & Company, Limited, were heard in respect to their said claims thereto or not. [77]

XXIV.

And for further answer to said Amended Bill of Complaint this respondent, New York Life Insurance Company alleges:

(a) That by laches and by lapse of time since the alleged rights of the said Samuel L. Rumsey, late husband of the said petitioner, and the said peti-

tioner, accrued, as set forth in said amended bill of complaint the right of the said Samuel L. Rumsey and of the said petitioner to have this Honorable Court decree that said policy of insurance be reformed by declaring the said petitioner the beneficiary under said policy of insurance, and the further right of said persons to have the said court decree that the said New York Life Insurance Company pay to the said petitioner the sum of $5,000 and interest as prayed for in said amended bill of complaint, became barred prior to the institution of this suit in equity.

(b) That by laches and by lapse of time since the alleged rights of Samuel L. Rumsey, late husband of the said petitioner, and the alleged rights of said petitioner accrued, as set forth in said amended bill of complaint the right of the said Samuel L. Rumsey, and of the said petitioner, to recover possession of the policy of insurance referred to in said amended bill of complaint became barred prior to the institution of this suit in equity, and that by reason thereof the said petitioner is not entitled to any relief in equity against this respondent, New York Life Insurance Company.

(c) That by laches and by lapse of time since the alleged rights of the said Samuel L. Rumsey and of the said petitioner accrued, as set forth in said amended bill of complaint, the right of the said Samuel L. Rumsey and of the said petitioner, to a decree of this Honorable Court that the said Benson, Smith & Company, Limited, is the trustee of the said petitioner in regard to [78] said policy

of insurance, became barred prior to the institution of this suit in equity and that by reason thereof the said petitioner is not entitled to any relief in equity against this respondent, New York Life Insurance Company.

XXV.

And this respondent denies all and all manner of unlawful combination and confederacy wherewith it is by said amended bill of complaint charged without this that if there is any other matter, cause or thing in said amended bill of complaint contained, material or necessary for this respondent to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed and avoided, or denied, this respondent denies that the same is true to its knowledge, information or belief. All of which matters and things this respondent is willing to aver, maintain, and prove as this Honorable Court shall direct, and humbly prays to be hence dismissed with its reasonable costs, expenses and charges in this behalf most wrongfully sustained.

Dated at Honolulu, this 2d day of October, A. D. 1916.

NEW YORK LIFE INSURANCE COMPANY,
One of the Respondents Above Named.
By (S.) THOMPSON, MILVERTON & CATHCART,
FWM.
Its Attorneys.

(S.) JAMES H. McINTOSH,
Of Counsel.
Per FWM.

Territory of Hawaii,
City and County of Honolulu,—ss.

Fred W. Milverton, being first duly sworn on oath, deposes and says: That he is a member of the firm of Thompson, Milverton & Cathcart, attorneys for the New York Life Insurance Company, one of the respondents in the above-entitled cause, and is duly authorized to make this verification; that he knows the contents of the foregoing answer and that the facts stated and allegations therein made are true except as to such as are made upon information and belief, and as to those that are made on information and belief he [79] has been creditably informed and believes them to be true.

(S.) FRED W. MILVERTON.

Subscribed and sworn to before me this 2d day of October, A. D. 1916.

[Seal] (S.) BERNICE K. DWIGHT,
Notary Public, First Judicial Circuit, Territory of Hawaii.

Service of a copy of the foregoing answer of the New York Life Insurance Company to the amended bill of complaint of the petitioner in the above-entitled action is hereby acknowledged this 9th day of October, A. D. 1916.

(S.) ANDREWS & PITTMAN,
Attorneys for Petitioner.

(S.) HOLMES & OLSON,
Attorneys for Respondent, Benson, Smith & Company, Limited.

[Endorsement]: Eq. No. 1993. Reg. 2, pg. 238. No. In the Circuit Court of the First Judicial Circuit, Territory of Hawaii. In Equity. Emma Forsyth Rumsey, Petitioner, vs. New York Life Insurance Company, a Corporation, and Benson, Smith & Company, Limited, a Corporation, Respondents. Separate Answer of Respondent New York Life Insurance Company. Filed at 11:00 o'clock A. M., October 9th, 1916. (S.) J. A. Dominis, Clerk. Thompson, Milverton & Cathcart, Attorneys at Law, Rooms 2–12, Campbell Block, Honolulu, Hawaii, Attorneys for Respondent. [80]

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

AT CHAMBERS—IN EQUITY.

(EQUITY No. 1993.)

ACTION TO REFORM AN INSTRUMENT AND DECLARE A TRUST

EMMA FORSYTH RUMSEY,

Petitioner,

vs.

NEW YORK LIFE INSURANCE COMPANY, a Corporation, and BENSON, SMITH & COMPANY, LIMITED, a Corporation,

Respondents.

Replication of Emma Forsyth Rumsey, Petitioner, to the Separate Answer of Respondent, New York Life Insurance Company.

This repliant, saving and reserving unto herself all and every manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto, saith: That she doth and ever will maintain and prove the bill filed heretofore in this case to be true, certain and sufficient in law to be answered unto by the said respondent and that the answer of said respondent is very uncertain, evasive and insufficient in the law to be replied unto by this repliant; without that, that any other matter or thing in said answer contained material or effective in the law replied unto and not herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed, or denied, is true all of which matters and things this repliant is ready to aver, maintain, and prove as this Honorable Court shall direct, and [81] humbly prays as in and by her said bill she hath already prayed.

Dated, Honolulu, T. H., October 10, 1916.

EMMA FORSYTH RUMSEY.

By (S.) ANDREWS & PITTMAN,

Her Attorneys.

Due service of the within and foregoing replica-

tion, by copy thereof, is hereby acknowledged this 10th day of October, 1916.

(S.) THOMPSON, MILVERTON & CATHCART,
CH.

Attorneys for Respondent, New York Life Insurance Co.

[Endorsement]: Eq. No. 1993. Reg. 2, pg. 238. E. No. 1993. Circuit Court, First Circuit, Territory of Hawaii. Emma Forsyth Rumsey, Petitioner, vs. New York Life Insurance Co., a Corporation, and Benson, Smith & Co., Ltd., a Corporation, Respondents. Replication. Filed October 10th, 1916, at 05 minutes past 1 o'clock P. M. (S.) J. A. Dominis, Clerk. Andrews & Pittman, 37 Merchant Street, Honolulu, T. H., Attorneys for Petitioner. [82]

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

AT CHAMBERS—IN EQUITY.

SUIT TO REFORM AN INSTRUMENT AND DECLARE A TRUST.

EMMA FORSYTH RUMSEY,
Petitioner,

vs.

NEW YORK LIFE INSURANCE COMPANY, a Corporation, and BENSON, SMITH & COMPANY, LIMITED, a Corporation,
Respondents.

Answer of Benson, Smith & Company, Limited, to Petitioner's Amended Bill of Complaint.

Benson, Smith & Company, Limited, a respondent in the above-entitled cause, now, and at all times hereafter reserving to itself all right of exception to the amended bill of complaint of Emma Forsyth Rumsey, petitioner herein, for answer thereto, or to so much thereof as this respondent is advised is material or necessary for it to make answer unto, now answers and alleges as follows:

I.

This respondent admits that the petitioner is the widow of Samuel L. Rumsey, formerly a resident of Honolulu, who died on the 27th day of July, 1910.

II.

This respondent admits the allegations set forth in paragraph II of said amended bill of complaint.

III.

This respondent admits that it is a corporation incorporated under the laws of the Territory of Hawaii for the purposes set forth in its Charter of Incorporation. [83]

IV.

This respondent admits the allegations set forth in paragraph IV of said amended bill of complaint.

V.

This respondent denies the allegations set forth in paragraph V of said amended bill of complaint, and alleges that at the time of the issuance of said policy of life insurance on the life of the said Samuel L. Rumsey, this respondent was regularly organized

and incorporated under the name of Benson, Smith & Company, Limited, and that it was intended to be designated as such as the beneficiary thereof in the said policy of insurance, and that in securing said insurance by the said Samuel L. Rumsey, it was the intention of each and all of the parties thereto to make the said policy of insurance for the benefit of this respondent, Benson, Smith & Company, Limited.

VI.

That in answer to the allegations contained in the VI paragraph of the said amended bill of complaint, this respondent admits that at the time of the issuance of said policy by the New York Life Insurance Company to the said Samuel L. Rumsey, as the assured, the said Samuel L. Rumsey held the office of treasurer of this respondent, and that George W. Smith was its president. This respondent denies that the said policy of life insurance passed into the physical possession of this respondent by reason solely of the connection of the said Samuel L. Rumsey with this respondent, but this respondent alleges that in the year 1903 Samuel L. Rumsey, George W. Smith and Alexis J. Gignoux were officers and directors of and holders of stock in this respondent corporation; that in the said year 1903, for the purpose of protecting the interests of this respondent in the event of the death of any of the said officers and directors, the said Samuel L. Rumsey, George W. Smith and Alexis J. Gignoux, in consideration [84] of the promise of each to the other, and in further consideration of this respondent's promise to pay the premiums thereon, agreed with and among them-

selves and with this respondent, to take out policies of insurance of Five Thousand Dollars ($5,000) each upon the respective lives of the said Samuel L. Rumsey, George W. Smith and Alexis J. Gignoux for the use and benefit and on the account of this respondent, and in consideration of the promises, it was further agreed with and among the said Samuel L. Rumsey, George W. Smith and Alexis J. Gignoux, and with this respondent, that the said Samuel L. Rumsey, George W. Smith and Alexis J. Gignoux should have no interest in or control over the policies thus taken out, but that the same should be given into the possession and control of this respondent for its sole use and benefit, the said agreement being fully ratified and approved by all of the stockholders of this respondent. This respondent further alleges that in pursuance of the said agreement, the said Samuel L. Rumsey, George W. Smith and Alexis J. Gignoux did take out policies upon their lives in the sum herinabove mentioned for the use and benefit and on the account of this respondent, as aforesaid; and that the said Samuel L. Rumsey, George W. Smith and Alexis J. Gignoux did deliver and give the said policies to this respondent and that thereafter this respondent did, and has paid, all premiums and conformed to all of the terms and conditions of the said agreement; and that the said policy of insurance on the life of the said Samuel L. Rumsey came into the possession and control of this respondent in pursuance of the terms and conditions of the said agreement between Samuel L. Rumsey and this respondent. And this respondent further alleges that at the

time of the issuance of the said policy, and up to and including the day of the death of the said Samuel L. Rumsey, and at [85] all times thereafter, this respondent, as beneficiary under said policy, was and is entitled to all benefits accruing thereunder; and that the said Samuel L. Rumsey was without right or power to violate the terms of the agreement made and entered into by him with the said George W. Smith, Alexis J. Gignoux and this respondent, and that all right given to him by the terms of the said policy of life insurance, as to a change of beneficiary thereof, was limited by and subject to the full performance by the said Samuel L. Rumsey of the terms of the agreement entered into between him, the said Samuel L. Rumsey, George W. Smith and Alexis J. Gignoux, and this respondent, as aforesaid.

VII.

This respondent admits the allegations set forth in paragraph VII.

VIII.

That in answer to the allegations contained in the VIII paragraph of the amended bill of complaint, this respondent denies that the said Samuel L. Rumsey was displaced from the position of treasurer of said corporation in the month of February, 1905, and on the contrary alleges the truth to be that the said Samuel L. Rumsey resigned from the position of treasurer of this respondent, said position being the one held by the said Samuel L. Rumsey at the time of the issuance to him of the said policy of life insurance. This respondent admits that thereafter the said Samuel L. was not an officer of this respondent,

but alleges that the said Samuel L. Rumsey remained a stockholder of this respondent and continued to be such up to and including the day of the death of the said Samuel L. Rumsey, to wit, the 27th day of July, 1910.

IX.

This respondent admits the allegations set forth in paragraph IX of the said amended bill of complaint. [86]

X.

That in answer to the allegations contained in the X paragraph of the said amended bill of complaint, this respondent admits that the said Samuel L. Rumsey made purported demand upon this respondent for the surrender of the said policy in the year 1905, asserting that he, the said Samuel L. Rumsey, intended to change the beneficiary under the terms of the said policy of life insurance; and this respondent alleges that immediately upon such notification of intention to change the beneficiary from this respondent to the petitioner herein, this respondent informed the said Samuel L. Rumsey that it would retain, and intended to at all times retain, possession and control of the said policy of life insurance in pursuance of the terms of the agreement made and entered into by the said Samuel L. Rumsey, George W. Smith and Alexis J. Gignoux and this respondent, and that because of the said agreement this respondent could and did at no time recognize or acknowledge the right of the said Samuel L. Rumsey to the possession or control of the said policy inviolation of and in breach of the agreement entered into by him and the parties

above named and this respondent, as aforesaid. This respondent denies that *if* at any time held said policy of insurance as a trustee for the said Samuel L. Rumsey, and alleges that the fact that the said Samuel L. Rumsey severed his active connection with this respondent as an officer thereof did not affect the validity of the said policy of life insurance, or in any way limit or deprive this respondent of the advantages and benefits to which it was entitled by the terms and conditions of the agreement entered into by the said Samuel L. Rumsey, as aforesaid.

XI.

That in answer to the allegations in the XI paragraph of the said amended bill of complaint, this respondent is ignorant and therefore is unable to admit or deny the same, and leaves [87] the petitioner to her proof thereof.

XII.

That in answer to the allegations in the XII paragraph of the said amended bill of complaint, this respondent is ignorant and therefore is unable to admit or deny the same, and leaves the petitioner to her proof thereof.

XIII.

That in answer to the allegations in the XIII paragraph of the said amended bill of complaint, this respondent alleges that the said Samuel L. Rumsey was without power to assign the said policy or change the beneficiary thereof to the prejudice of this respondent's rights therein; and this respondent further alleges that all premuims on said policy were paid by this respondent.

XIV.

This respondent admits the allegations set forth in paragraph XIV of said amended bill of complaint.

XV.

This respondent admits the allegations set forth in paragraph XV of said amended bill of complaint.

XVI.

That in answer to the allegations contained in paragraph XVI of said amended bill of complaint, this respondent admits that purported notice was given to it in August 1907 of the alleged rights and claims of Samuel L. Rumsey by the said Samuel L. Rumsey and by the petitioner herein, and this respondent alleges that at no time prior to the institution of this suit did the said Samuel L. Rumsey or the petitioner herein offer to repay to this respondent the full amount of the premiums paid by this respondent to the New York Life Insurance Company in observance of its obligation under [88] the agreement entered into by the said Samuel L. Rumsey, George W. Smith, Alexis J. Gignoux and this respondent, as hereinabove set forth, but this respondent alleges that it at all times informed the said Samuel L. Rumsey and the petitioner herein that it refused and would refuse to waive any of its rights under the terms and conditions of the agreement entered into by the said Samuel L. Rumsey at the time the said policy of insurance was secured, and that the said Samuel L. Rumsey and the petitioner herein were fully advised by this respondent that it would rely upon its legal rights in the premises, and that the refusal of this respondent to deliver up said

policy of life insurance to said Samuel L. Rumsey was by reason of its contractual right to retain the said policy of insurance until the purposes of the said agreement entered into by the said Samuel L. Rumsey, George W. Smith, Alexis J. Gignoux and this respondent were fully discharged.

XVII.

That in answer to the allegations contained in paragraph XVII of said amended bill of complaint, this respondent admits that the petitioner herein notified this respondent of her alleged claims as an alleged beneficiary under said policy of life insurance and requested that this respondent cease paying premiums thereon; and this respondent alleges that in response to the alleged claims of said petitioner this respondent at all times asserted and affirmed its legal right to hold and retain the possession of the said policy of insurance under the terms and conditions of the said agreement entered into by the said Samuel L. Rumsey, George W. Smith, and Alexis J. Gignoux and this respondent. [89]

XVIII.

This respondent admits the allegations set forth in paragraph XVIII.

XIX.

That in answer to the allegations contained in the XIX paragraph of the amended bill of complaint, this respondent is ignorant and therefore is unable to admit or deny, and leaves the petitioner to her proof thereof.

XX.

That in answer to the allegations contained in the

XX paragraph of the amended bill of complaint, this respondent is ignorant and therefore is unable to admit or deny, and leaves the petitioner to her proof thereof.

XXI.

That in answer to the allegations contained in the XXI paragraph of the amended bill of complaint, this respondent is ignorant and therefore is unable to admit or deny, and leaves the petitioner to her proof thereof.

XXII.

That in answer to the allegations contained in the XXII paragraph of the said amended bill of complaint, this respondent alleges that the said policy of life insurance issued in the year 1903 by the New York Life Insurance Company to Samuel L. Rumsey, as the assured, was secured by Rumsey in the performance of an agreement entered into between himself, George W. Smith and Alexis J. Gignoux, and this respondent, the said Samuel L. Rumsey, George W. Smith and Alexis J. Gignoux being at that time officers and directors and holders of stock in this respondent; that the policies of life insurance each in the sum of Five Thousand Dollars ($5,000) were secured by the said Samuel L. Rumsey, George W. Smith and Alex J. Gignoux for the purpose of protecting the [90] interests of this respondent in the event of the death of any of the said officers and directors; that the specific purpose of the said policies of life insurance, secured in consideration of the promise of each of the said parties each to the other and in further consideration of this respondent's

promise to pay the premiums thereon, was to provide a fund, which upon the decease of any of the said parties insured, would provide for the purchase of the stock held by the deceased, the stock so held to be bought in, at a fair valuation, for the mutual benefit of the deceased's estate and the members of the corporation of Benson, Smith & Company, Limited. And this respondent further alleges that in the performance and observance of its part in the said agreement, it paid all of the premiums on the said policy of insurance to the New York Life Insurance Company.

XXIII.

That in answer to the allegations contained in the XXIII paragraph of the said amended bill of complaint, this respondent denies that the said agreement entered into, as hereinabove set forth, for the mutual advantage and profit of the parties can in any way be construed as a "gamble in insurance on human life" as alleged in said paragraph of petitioner's amended bill of complaint, and this respondent alleges that the said benefits accruing under the said policy were and have at all times been rightfully belonging to this respondent, and that no legal or equitable right whatever was in Samuel L. Rumsey, or the petitioner herein, to deprive this respondent of the benefits to which it was and is entitled by the agreement entered into by the said Samuel L. Rumsey, George W. Smith, Alexis J. Gignoux and this respondent. [91]

XXIV.

This respondent denies that it deliberately, wil-

fully or collusively, or otherwise, kept from petitioner knowledge of the institution and pendency of the action brought by this respondent in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii against the New York Life Insurance Company to recover the proceeds of the said policy of insurance, but, on the contrary, alleges the truth to be that it at divers times prior to the institution of said action, informed and notified the said petitioner and her attorneys that this respondent would proceed to enforce its claim against the New York Life Insurance Company for the amount of the said policy on the life of Samuel L. Rumsey and rightfully payable to this respondent upon the death of the said assured, and that the petitioner was fully and fairly informed at all times as to the position of this respondent in respect to the enforcement of its rights as designated beneficiary of said policy of life insurance on the life of Samuel L. Rumsey, as the assured, and that the attorneys for the said petitioner, Messrs. O'Donell & Graham, of Denver, Colorado, herein, were specifically notified by this respondent, through George W. Smith, its president and manager, by letter under date of the 15th day of November, 1910, that this respondent would institute legal proceedings against the New York Life Insurance Company in the event of the said company refusing to pay to this respondent the proceeds of said policy rightfully due and payable to this respondent as the designated beneficiary, and in pursuance of the agreement entered into by the said Samuel L. Rumsey, George W. Smith, Alexis J. Gignoux and this respondent as

hereinbefore set forth for the specific uses and purposes set forth in paragraphs 6 and 22 of this respondent's answer. [92]

XXV.

And for further answer to said Amended Bill of Complaint this respondent, Benson, Smith & Company, Limited, alleges:

(a) That by laches and by lapse of time since the alleged rights of the said Samuel L. Rumsey, late husband of the said petitioner, and the said petitioner, secured, as set forth in said amended bill of complaint the right of the said Samuel L. Rumsey and of the said petitioner to have this Honorable Court decree that said policy of insurance be reformed *be* declaring the said petitioner the beneficiary under said policy of insurance.

(b) That by laches and by lapse of time since the alleged rights of Samuel L. Rumsey, late husband of the said petitioner, and the alleged rights of said petitioner accrued, as set forth in said amended bill of complaint the rights of the said Samuel L. Rumsey, and the said petitioner, to recover possession of the policy of insurance referred to in said amended bill of complaint became barred to the institution of this suit in equity, and that said petitioner is not entitled to any relief in equity, against this respondent, Benson, Smith & Company, Limited.

(c) That by laches and by lapse of time since the alleged rights of the said Samuel L. Rumsey and of the said petitioner accrued, as set forth in said amended bill of complaint, the right of the said Samuel L. Rumsey and of the said petitioner, to a

decree of this Honorable Court that the said Benson, Smith & Company, Limited, is the trustee of the said petitioner in regard to said policy of insurance, became barred prior to the institution of this suit in equity.

XXVI.

And this respondent denies all and all manner of unlawful combination and confederacy wherewith it is by said amended bill of complaint charged without this that if there is any other matter, cause or thing in said amended bill of complaint contained, material [93] or necessary for this respondent to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed and avoided, or denied, this respondent denies that the same is true to its knowledge, information or belief. All of which matters and things this respondent is willing to aver, maintain, and prove as this Honorable Court shall direct, and humbly prays to be hence dismissed with its reasonable costs, expenses and charges in this behalf most wrongfully sustained.

Dated, Honolulu, T. H., October 10th, 1916.

BENSON, SMITH & COMPANY, LIMITED,
One of the Respondents Above Named,
By (S.) HOLMES and OLSON,
Its Attorneys. [94]

Territory of Hawaii,
City and County of Honolulu,—ss.

GEORGE W. SMITH, being first duly sworn on oath, deposes and says:

That he is the president of Benson, Smith & Com-

pany, Limited, a corporation, respondent above named, and that he is authorized to make and does make this verification in its behalf; that he knows the contents of the foregoing answer and that the facts stated and allegations therein made are true, except as to such as are made upon information and belief, and that as to those that are made upon information and belief, he believes them to be true.

(S.) GEO. W. SMITH.

Subscribed and sworn to before me this 10th day of October, 1916.

[Seal] (S.) FLORENCE LEE,
Notary Public, First Judicial Circuit, Territory of Hawaii.

[Endorsement]: Eq. No. 1993. Reg. 2, pg. 238. In the Circuit Court of the First Judicial Circuit, Territory of Hawaii. At Chambers. In Equity. Emma Forsyth Rumsey, Petitioner, vs. New York Life Insurance Company, a Corporation, and Benson, Smith & Company, Limited, a Corporation, Respondents. Answer of Benson, Smith & Company, Limited, to Petitioner's Amended Bill of Complaint. Filed at 3:55 o'clock P. M. October 10th, 1916. (S.) J. A. Dominis, Clerk. Holmes & Olson, 863 Kaahumanu St., Honolulu, Attorneys for Benson, Smith & Company, Limited.

Service of the within Answer of Benson, Smith & Company, Limited, to petitioner's amended bill of complaint and service of a copy thereof is acknowledged this 10th day of October, 1916.

(S.) ANDREWS & PITTMAN,
Attorneys for Petitioner. [95]

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

AT CHAMBERS—IN EQUITY.

ACTION TO REFORM AN INSTRUMENT AND DECLARE A TRUST.

(EQUITY No. 1993.)

EMMA FORSYTH RUMSEY,

Petitioner,

vs.

NEW YORK LIFE INSURANCE COMPANY, a Corporation, and BENSON, SMITH & COMPANY, LIMITED, a Corporation,

Respondents.

Replication of Emma Forsyth Rumsey, Petitioner, to the Answer of Benson, Smith & Company, Limited.

This repliant, saving and reserving unto herself all and every manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto, saith: That she doth and ever will maintain and prove the bill filed heretofore in this case to be true, certain and sufficient in law to be answered unto by the said respondent and that the answer of said respondent is very uncertain, evasive and insufficient in the law to be replied unto by this repliant; without that, that any other matter or thing in said answer contained material or effective in the law replied unto and not herein and hereby well and sufficiently replied unto, confessed, or avoided, tra-

versed, or denied, is true; all of which matters and things this repliant is ready to aver, maintain, and prove as this Honorable Court shall direct, [96] and humbly prays as in and by her said bill she hath already prayed.

Dated, Honolulu, T. H., October 12, 1916.

EMMA FORSYTH RUMSEY,

By (S.) ANDREWS & PITTMAN,

Her Attorneys.

Due service of the within and foregoing replication, by copy thereof, is hereby acknowledged this 12th day of Ooctober, 1916.

(S.) HOLMES & OLSON,

Attorneys for Respondent, Benson, Smith & Company, Limited.

[Endorsed]: Eq. No. 1993. Reg. 2, pg. 238. E. No. 1993. Circuit Court, First Circuit, Territory of Hawaii. Emma Forsyth Rumsey, Petitioner, vs. New York Life Insurance Company, a Corporation, et al., Respondents. Replication of Emma Forsyth Rumsey, Petitioner, to the Answer of Benson, Smith & Company, Limited. Filed October 12th, 1916, at 40 minutes past 2 o'clock P. M. (S.) J. A. Dominis, Clerk. Andrews & Pittman, 37 Merchant Street, Honolulu, T. H., Attorneys for Petitioner. [97]

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

AT CHAMBERS—IN EQUITY.

ACTION TO REFORM AN INSTRUMENT, DECLARE A TRUST, ETC.

[Stamped]: Circuit Court. Mar. 5, 1918. First Jud. Circuit.

EMMA FORSYTH RUMSEY,

Petitioner,

vs.

NEW YORK LIFE INSURANCE COMPANY, a Corporation, and BENSON, SMITH & COMPANY, LIMITED, a Corporation,

Respondents.

Stipulation as to Agreed Statement of Facts, etc.

IT IS HEREBY STIPULATED by and between the above-named petitioner, Emma Forsyth Rumsey, by her attorneys, Messrs. Andrews and Pittman, the above-named respondent New York Life Insurance Company, a corporation, by its attorneys, Thompson and Cathcart, and the above-named respondent Benson, Smith & Company, Limited, a corporation, by its attorneys, Messrs. Henry Holmes and Clarence H. Olson, that the statement of facts herein contained be and they are hereby admitted by said parties; that copies of letters herein contained duly forwarded and received by the respective senders, addressees and recipients, as by said letters, etc., indicated may be considered by the Court to be in evi-

dence in the cause in so far as the same, or any part or portion thereof, may be material to the issues in the cause or relevant thereto and that the depositions of George W. Smith, the deposition of Alexis J. Gignoux and the deposition of William H. Purdy, herein contained are true and correct copies of said depositions, including all direct and cross-interrogatories and all of the answers thereto and that the same may be considered by the Court to be in evidence in so far as the same, or any part or portion thereof, may be material to the issues in the cause or relevant thereto: [98]

I.

That the said respondent, Benson, Smith & Company, Limited, is now and at all of the times mentioned and referred to in the amended bill of complaint of said petitioner was a corporation duly organized and existing under and by virtue of the laws of the Territory of Hawaii.

That the said Benson, Smith & Company, Limited, was incorporated on the 3d day of January, 1898, under the following Articles of Association, which said Articles of Association have ever since said 3d day of January, 1898, remained unchanged except as to an amendment made on the 8th day of March, 1911, hereinafter set forth. [99]

ARTICLES OF ASSOCIATION
OF
BENSON, SMITH & CO., LIMITED.

BE IT KNOWN, That the undersigned residents of Honolulu Island of Oahu by these presents have associated themselves as, and form a body corporate

under the name of BENSON, SMITH & CO., LIMITED.

That the principal office of said corporation shall be at Honolulu Island of Oahu aforesaid;

That the purpose of the company is the buying, selling and dealing in and manufacturing drugs, medicines and other commodities pertaining to said line of business;

That the capital stock of said corporation shall be the sum of thirty-five thousand dollars, divided into three hundred and fifty shares of the par value of one hundred dollars each share, which capital stock may be doubled hereafter so as to amount to seventy thousand divided into seven hundred shares of the like par value of one hundred dollars each share.

That the officers of said corporation shall be five in number and by designation shall be a president, a vice-president, a secretary, a treasurer and an auditor.

That the following persons shall be the first officers of said corporation who shall act and continue to act as such officers until their successors shall be elected in conformity with the rules of said corporation which may be hereafter adopted, to wit:

President	Geo. W. Smith.
Vice-President	J. H. Fisher
Secretary	J. A. Kennedy
Treasurer	S. L. Rumsey
Auditor	Geo. F. McLeod.

That the legal existence of said corporation shall be the period of fifty years.

In witness whereof the said corporators have

hereto set their respective names this third day of January, A. D. 1898.

GEO. W. SMITH.
J. H. FISHER.
JAMES A. KENNEDY.
S. L. RUMSEY.
GEO. McLEOD.

Hawaiian Islands,
Island of Oahu,—ss.

On this 3d day of January, A. D. 1898, personally appeared before me Geo. W. Smith, J. H. Fisher, James A. Kennedy, S. L. Rumsey and Geo. McLeod, known to me to be the persons described in and who executed the foregoing instrument who severally acknowledged to me that they executed the same freely and voluntarily, and for the uses and purposes therein set forth. [100]

Line 13—first page after the words "dealing in" the words "and manufacturing" were inserted prior to execution.

[Notary Seal] C. D. CHASE,
Notary Public, First Judicial Circuit.

The said Articles of Association were on the 8th day of March, 1911, duly amended so that the clause thereof relating to capital stock read as follows:

> "That the Capital Stock of the Company shall be the sum of SEVENTY THOUSAND DOLLARS ($70,000) divided into Seven Hundred (700) shares of the par value of One Hundred Dollars ($100) each, with the privilege, after notice to the Treasurer of the Territory of Hawaii, of subsequent extension not to exceed

Two Hundred and Fifty Thousand Dollars ($250,000) in like shares of One Hundred Dollars ($100.00) each; but, no increase of the Capital Stock shall be made without the consent of stockholders holding at least sixty per cent of the Capital Stock of the corporation." [101]

II.

That at all times the Head or Home Office of the said respondent, New York Life Insurance Company, has been and now is in the City of New York, State of New York.

That on or about the 11th day of June, 1903, the Samuel L. Rumsey referred to in said amended bill of complaint, at the City of Honolulu, Territory of Hawaii, signed and delivered to William A. Purdy an application to the said respondent, New York Life Insurance Company, for insurance in the sum of Five Thousand Dollars ($5,000.00) on the life of him, the said Samuel L. Rumsey. That at the time said application was so filed and delivered, the said William A. Purdy was an Agent of the said respondent, New York Life Insurance Company, authorized only by it to solicit applications for insurance in the Territory of Hawaii and to collect premiums under certain designated conditions and was compensated for his services in the regard by a commission from the first premium on policies, the applications for which were solicited by him provided such policies became contracts and the premium was paid. That the said William A. Purdy had no authority on behalf of the said New York Life Insurance Company to make, alter or discharge any contract whatsoever.

That said application of the said Samuel L. Rumsey was in the words and figures set forth in Exhibit "A" attached to said amended bill of complaint. [102]

III.

That at the time the said Samuel L. Rumsey so applied for said policy of insurance and prior thereto in the year 1903 and thereafter until after the execution and delivery of the policy of insurance upon said application, as hereinafter set forth, the said Samuel L. Rumsey and one George W. Smith and one Alexis J. Gignoux were officers, directors and stockholders of and in the said respondent corporation, Benson, Smith & Company, Limited, the said George W. Smith being the President thereof, the said Samuel L. Rumsey being the Treasurer thereof and the said Alexis J. Gignoux being the Secretary thereof. That in the year 1903 and prior to the said application for insurance, and for the purpose of protecting the interests of the said Benson, Smith & Company, Limited, in the event of the death of any of the said Samuel L. Rumsey, George W. Smith and Alexis J. Gignoux, officers, directors and stockholders as aforesaid, the said Samuel L. Rumsey, George W. Smith and Alexis J. Gignoux agreed to take out a policy of insurance in the sum of $5,000 on their respective lives in favor of Benson, Smith & Company, Limited, and that in accordance with said agreement the policies of insurance so taken out were placed in the custody and possession of Benson, Smith & Com-

Purpose.

pany, Limited, the beneficiary named in each of said policies. [103]

That in the due course of mail after the said 11th day of June, 1903, said respondent, New York Life Insurance Company, received at its said Home Office in the City of New York, three several like applications for insurance which had been solicited by its said agent, William A. Purdy, each of said applications being dated the 11th day of June, 1903, one made by the said George W. Smith, another made by the said Alexis J. Gignoux, and the third the said application of the said Samuel L. Rumsey, each of said applications being for insurance in the sum of Five Thousand Dollars ($5,000.00) on the life of said respective applicants, and each application being for the same kind of policy and each providing that the insurance money should be payable, in the event of the death of the insured, to the said respondent, Benson, Smith & Company, Limited. That said several applications were then and there accepted by respondent, the New York Life Insurance Company, and said Insurance Company made three separate policies of insurance as applied for accordingly; that said three several policies were each of the same tenor and effect, except as to the name of the applicant and of the insured, and were each and all payable to said respondent, Benson, Smith & Company, Limited, and each contained the change of beneficiary clause which is set forth in the amended bill of complaint herein. [104]

Said three several policies of insurance were executed at the Home Office of the said respondent, New

York Life Insurance Company, on behalf of said respondent by John A. McCall as President of the said New York Life Insurance Company, by Charles C. Whitney as Secretary thereof, and by William W. Ferrier as Registrar thereof, and upon being so executed, were transmitted by due course of mail to said William A. Purdy, Special Agent of said New York Life Insurance Company, at the said City of Honolulu, Territory of Hawaii, and by him there delivered to the said respondent, Benson, Smith & Company, Limited.

That prior to such execution and delivery of said policy by said officers of the respondent New York Life Insurance Company, the said application of the said Samuel L. Rumsey and the said applications of the said George W. Smith and Alexis J. Gignoux were passed by the Medical Director of the said New York Life Insurance Company in said City of New York.

That said policy of insurance so issued to the said Samuel L. Rumsey contained among others the following provisions:

POLICY.

"NEW YORK LIFE INSURANCE COMPANY Agrees to pay Five Thousand Dollars, to the firm of Benson, Smith & Co. Ltd. or its legal representatives or to such Beneficiary as may have been duly designated, at the Home Office of the Company, in the City of New York, immediately upon receipt and approval of proofs of the death of Samuel L. Rumsey, the Insured, of Honolulu, in the Island of Oahu, Hawaii.

CHANGE OF BENEFICIARY.—The Insured, having reserved the right, may change the Beneficiary, or Beneficiaries, at any time during the continuance of this Policy, by written notice to the Company at the Home Office, provided this Policy is not then assigned. The Insured may at any time, by written notice to the Company at the Home Office, declare any Beneficiary then named to be an Absolute Beneficiary under this Policy. No designation, or change of Beneficiary, or declaration of an Absolute Beneficiary, shall take effect until endorsed on this Policy by the Company at the Home Office. During the lifetime of an Absolute Beneficiary the right to revoke or change the interest of that Beneficiary will not exist in the Insured. If any Beneficiary, or Absolute Beneficiary, dies before the Insured, the interest of such Beneficiary will become payable to the Executors, Administrators or Assigns of the Insured." [105]

* * * * * * * * *

"GENERAL PROVISIONS.—(1) Only the President, a Vice-President, the Actuary, or the Secretary has power in behalf of the Company to make or modify this or any contract of Insurance or to extend the time for paying any premium, and the Company shall not be bound by any promise or representation heretofore or hereafter given by any person other than the above. (2) Premiums are due and payable at the Home Office, unless otherwise agreed in writing, but may be paid to an agent producing receipts signed by one of the above-named officers and countersigned by the agent. If any pre-

mium is not paid on or before the date when due, the liability of the Company shall be only as hereinbefore provided for such case. (3) If the age of the Insured is incorrectly stated, the amount payable under this Policy shall be the Insurance which the actual premium paid would have purchased at the true age of the Insured. Age will be admitted on satisfactory proof. (4) In any distribution of surplus or apportionment of Profits, the principles and methods which may be adopted by the Company for such distribution or apportionment and its determination of the amount equitably belonging to this Policy shall be conclusive upon the Insured and upon all parties having or claiming any interest under this Policy. (5) Any indebtedness to the Company including any balance of the premium for the Insurance year remaining unpaid, will be deducted in any settlement of this Policy, or of any benefit thereunder. (6) Any assignment of this Policy must be made in duplicate and both sent to the Home Office, one to be retained by the Company and the other to be returned. The Company has no responsibility for the validity of any assignment."

* * * * * * * * *

"REGISTER OF CHANGE OF BENEFICIARY. NOTE.—No notice of Beneficiary or declaration of the Absolute Beneficiary shall take effect until endorsed on this Policy by the Company at the Home Office."

* * * * * * * * *

"IN WITNESS WHEREOF the NEW YORK LIFE INSURANCE COMPANY has caused this

Agreement to be signed by its President and Secretary, and countersigned by its Registrar or Assistant Registrar.

JOHN A. McCALL,
President.

CHAS. C. WHITNEY,
Secretary.

WM. W. FERRIER,
Registrar."

That after the execution and delivery as above stated of said three several policies of insurance upon the lives of the said [106] George W. Smith, Samuel L. Rumsey and Alexis J. Gignoux, the said respondent, Benson, Smith & Company, Limited, paid and continued to pay all premiums due under the terms and conditions of said policies, and particularly paid to the said respondent, New York Life Insurance Company, during the lifetime of the said Samuel L. Rumsey, all premiums due said New York Life Insurance Company under the terms and conditions of the said policy of insurance upon the life of the said Samuel L. Rumsey.

That at the time said three several policies of insurance were so executed and delivered, the said George W. Smith was the owner of three hundred and sixty-three (363) shares of the capital stock of said respondent, Benson, Smith & Company, Limited, the said Samuel L. Rumsey was the owner of one hundred (100) shares of said capital stock, and the said Alexis J. Gignoux was the owner of thirty (30) shares of said capital stock out of a total of five hundred (500) shares.

That on the 31st day of August, 1906, the said petitioner, Emma Forsyth Rumsey and the said Samuel L. Rumsey were married at Denver, Colorado, and thereafter lived together as husband and wife until the death of the said Samuel L. Rumsey.

That on or about the 9th day of July, 1907, the said Samuel L. Rumsey transferred the said one hundred (100) shares of the capital stock of respondent, Benson, Smith & Company, Limited, theretofore held by him, to Emma Forsyth Rumsey, the petitioner in the above-entitled cause, and that shortly thereafter the said petitioner sold one-half (½) of said shares of stock, to wit: fifty (50) shares thereof, to the said respondent, Benson, Smith & Company, Limited, through the said George W. Smith, the President thereof. That the said Petitioner, Emma Forsyth Rumsey, continued to hold the remaining fifty (50) shares of said capital stock until after the death of the said Samuel L. Rumsey, when the same were sold by her to the said respondent, Benson, Smith & Company, Limited. [107]

That shortly after the issuance of the said policy of insurance on the life of the said Samuel L. Rumsey, the health of the said Samuel L. Rumsey became so impaired that he, the said Samuel L. Rumsey, was compelled to and did cease active connection with the business of the said respondent, Benson, Smith & Company, Limited, and in the month of January, 1904, left the Territory of Hawaii, and was never again actively connected with the said respondent, Benson, Smith & Company, Limited, or its business, and never again returned to the Territory of Hawaii.

That in the month of February, 1905, the said Samuel L. Rumsey ceased to hold the office of Treasurer of the said respondent, Benson, Smith & Company, Limited, theretofore held by him. That the salary of the said Samuel L. Rumsey as Treasurer of said Benson, Smith & Company, Limited, was the sum of Two Hundred and Fifty Dollars ($250.00) per month, and in the month of October, 1904, it having then become apparent to him, the said Samuel L. Rumsey, and to the said respondent, Benson, Smith & Company, Limited, that he, the said Samuel L. Rumsey, could not, on account of the condition of his health, ever return to the Territory of Hawaii or ever again resume active connection with the said respondent, Benson, Smith & Company, Limited, or its business, it was agreed between the said Samuel L. Rumsey and the said respondent, Benson, Smith & Company, Limited, that his said salary as Treasurer should thereupon cease, and in pursuance of said agreement, the said Samuel L. Rumsey never thereafter drew any salary or compensation from the said respondent, Benson, Smith & Company, Limited, as an officer or employee of said corporation.

That at all times since the said policy of insurance was so issued upon the life of the said Samuel L. Rumsey, and until after [108] the recovery of judgment by the said respondent, Benson, Smith & Company, Limited, against the said respondent, New York Life Insurance Company for the amount of said policy, which judgment is hereinafter referred to, the said respondent, Benson, Smith & Company, Limited, held and continued to hold the said policy

of insurance so issued upon the life of the said Samuel L. Rumsey claiming the right to so hold the same under and by virtue of the agreement relating thereto, hereinbefore set out.

That at the time said policy of insurance was so issued upon the life of the said Samuel L. Rumsey, it was the understanding and intention of the said respondent, New York Life Insurance Company, the said Samuel L. Rumsey, and the said respondent, Benson, Smith & Company, Limited, that the beneficiary to be named and named in said policy of insurance was the said respondent, Benson, Smith & Company, Limited, and that the phrase used in said policy "to the firm of Benson, Smith & Company, Limited," applied to and was intended by said parties to apply to and mean the said respondent, Benson, Smith & Company, Limited.

IV.

That the following are true and correct copies of letters, etc., duly forwarded and received by the respective senders, addressees and recipients as by said letters, etc., indicated, bearing upon and relating to the matters in controversy in the above-entitled cause. That all of said letters, etc., may be considered by the Court to be in evidence in said cause in so far as the same, or any part or portion thereof, may be material to the issues in the cause or relevant thereto.

That in said and any other correspondence set out or referred to in this stipulation, the name "George" or "Smith" and "George W. [109] Smith" refers to George W. Smith, President of the respondent, Benson, Smith & Company, Limited, the name "T. J.

O'Donnell'' refers to the attorney of the said petitioner, Emma Forsyth Rumsey, and the said Samuel L. Rumsey, the name ''O'Donnell & Graham'' refers to the attorneys of the said petitioner, Emma Forsyth Rumsey, and the said Samuel L. Rumsey, the word ''Rumsey'' or ''L. Rumsey'' or ''S. L. Rumsey'' or ''Samuel L. Rumsey'' refers to the said Samuel L. Rumsey, the name ''Mrs. S. L. Rumsey'' or ''Emma F. Rumsey'' or ''Mrs. E. F. Rumsey'' or ''Emma Forsyth Rumsey'' or ''Emma Forsyth Creary'' refers to the said petitioner, ''Emma Forsyth Rumsey,'' the name ''Benson-Smith'' or ''Benson, Smith & Company, Limited,'' refers to the said respondent, Benson, Smith & Company, Limited, the name ''Holmes, Olson & Stanley'' or ''Holmes & Olson'' refers to the attorneys for the said respondent, Benson, Smith & Company, Limited, the name ''A. R. Fleming'' refers to the Cashier at the City of Denver, Colorado, of the said respondent, New York Life Insurance Company, the name ''E. A. Anderson'' refers to the Comptroller at the City of New York of the said respondent, New York Life Insurance Company, the name ''F. A. Jackson'' refers to the Comptroller at the City of New York of the said respondent, New York Life Insurance Company, the name ''John C. McCall'' refers to the Secretary or Second Vice-President of the said respondent, New Youk Life Insurance Company, the name ''Claude E. Griffey'' refers to the Agency Director at New York City of the said respondent, New York Life Insurance Company, the name ''James H. McIntosh'' refers to the General Counsel at New York City of the said respondent, New York

Life Insurance Company, the name "Charles W. Waterman" or "C. W. Waterman" refers to the attorney of the said respondent, New York Life Insurance Company, at the city of Denver, Colorado, the name "James A. Gorman" refers to the Resident Manager of said respondent, New York Life Insurance Company, at the City and County [110] of Honolulu, Territory of Hawaii, the name "Norman R. Haskell" refers to the Superintendent of said respondent, New York Life Insurance Company, at the city of New York, the name "F. A. Wickett" refers to the cashier of said respondent, New York Life Insurance Company, at the city and county of Honolulu, Territory of Hawaii, and the word "Nylic" and the words "New York Life Insurance Company" refer to the said respondent, New York Life Insurance Company. [111]

Col. Springs, Colo.
Oct. 19th, 1904.

Mr. Geo. W. Smith,
Pres. & Manager
Benson, Smith & Co. Ltd.

Dear Sir:

As I have been practically out of commission for over a year and unable to attend to my duties, I relinquish my entire salary. I have brot this up before under another form and this is final on my part my interest in and attitude towards the house always the same.

I am faithfully yours,

(S.) S. L. RUMSEY,
Treasurer. [112]

SAVOY,
Broadway and Seventh Ave.
DENVER, COLO., May 1st, 06.

Dear George:

* * * * * * * * *

My stock only pays 5% & without salary it is impossible for me to live & in that respect I am worse off than any other member of the firm. If these conditions were otherwise I would have returned before this & taken up my work so long as I could follow it & then relinquish. If on receipt of this there is no change I see no other recourse but to withdraw my investment with you entire which of course would carry with it resignation as officer & member & I authorize you for me to realize on my stock all you can under & by virtue of these circumstances & transmit to me here. This step of course I regret but I can see no other solution. It was my hope and intention to end my days there & with the house. You have told me there is no further room. I would ret' under any circumstances could I afford it. My wife has always looked forward to living there with content & will be disappointed sorely. I intended going to Los Angeles & wrote there to friends but now see no immediate future or in S. F. I expect to go to Lexington Ky with my wife on bus' but my address will be here until I notify you to the contrary. Meanwhile asking your earliest consideration of this & with my kind regards to all

I remain very truly yours,

(S.) S. *M.* RUMSEY.

Confirming former letter in ans. to yours from S. F.

Walters (J. J. rep?) here says he has tried to get depot here but freight discrimination is against it.

(S.) R. [113]

BENSON, SMITH & CO., LTD.,
Wholesale and Retail
DRUGGISTS
Cor. Fort and Hotel Streets
Honolulu, T. H., May 13th, 1906.

My dear Rumsey:

* * * * * * * * *

I take up now the proposition contained in your letter in regard to the withdrawal of your capital in this house.

Permit me first to correct you on one point on which you seem to lay some emphasis. In all of my conversation with you in Denver I did not state to you as you have stated in your letter, I quote, "You have told me there is no further room."

After leaving Denver, on the cars, I carefully reviewed our talk to see if I had in any way said anything that would have hurt your feelings or said anything that I would regret, from a personal and fraternal standpoint. I could not think that I had.

What I endeavored to convey to you was that, while in your mind since your absence, matters had stood still and open waiting for your return, as a matter of fact things had continued to move and progress whether you or I, were present or on hand to direct. That the young men had advanced to positions of trust and knowledge of the business, that they were doing work that I had been doing, that you had done, that the position held by you was most satisfactorily filled by

a man, who from disassociation with any of us in a fraternal or relative way, was absolutely unbiased and aloof from any favoritism and free from the possibility of a charge of unfairness and that I should keep him there while I remained at the head of the business.

I pointed out to you that it would be an injustice and a move that would cause loss of interest, if not withdrawal, to put either of the young men down to a lower position. I endeavored to show you that, in spite of your optimism, it was very doubtful if you could again live in this climate, this from the experience of others and the dictum of medical men of experience and learning in their profession as well as the experience I had had with those who had returned here. I endeavored to advise you to secure an opportunity where you could live, an opportunity that would give you an income and, at the same time, preserve to you the dignity and position to which you are entitled. All of this I tried to do with a feeling of the most friendly, nay brotherly, character and had hoped that you had so taken it. I can only attribute your statement to a feeling of disappointment, one which is natural and which I. also, would feel and even now feel for I realize that it is inevitable that, eventually, I too will have to step out to make room for the younger men that are coming forward.

I shall give the most careful consideration to the matter with the end in view of preserving to you every advantage and benefit that can be obtained. I shall advise you of the details a little later. In making a move of this kind, while protecting your inter-

est [114] I must also protect the business in every way possible, not cripple it in any way, not only as a protection to you but, also, to those who are now maintaining and conducting it. As stated I shall advise you in the very near future.

I enclose a number of papers wanted, and with the kindest regards from staff and self to Mrs. Rumsey and yourself I am

Yours very truly,
(S.) GEO. W. SMITH.

Enclosures. Last Will.
Statement of Account.
Letter Received.
Notice L. & H.
Lodge Receipts. [115]

Honolulu, T. H. June 18th, 1906.

My dear Rumsey:—

I confirm my letter of the 13th of May and now submit for your consideration the following proposition in reference to the purchase of your shares of stock in this business, the total value of which is Ten Thousand Dollars.

We will pay you, on July 1st, 1906, by Draft, Twenty-five Hundred Dollars, (2,500.00), for twenty-five shares of your stock, (2). On January 1st, 1907, we will pay you Twenty-five Hundred Dollars, ($2,500.00), for a second twenty-five shares of the stock. (3). On July 1st, 1907 we will pay the third Twenty-five Hundred Dollars, ($2,500.00), for the third twenty-five shares of the stock, and, (4), on December 31st, 1907, we *will* make the fourth payment

of Twenty-five Hundred Dollars, ($2,500.00), for the last twenty-five shares of the stock.

The right being reserved to make, at any time in the period, a larger payment or payments, to retire more of the stock.

In the meantime, all, or any, shares remaining in your name will continue to participate in and share any profits of the business which, at the present time, on last years business is six per cent, (6%), and shares remaining during 1907 will, as stated above, participate in any profits of the business, for the year ending Dec. 31st, 1906, the same as any shares held by any stockholder in the Corporation.

You have stated, in your letter of the 1st, of May, that money is obtainable in Denver at 5% per annum.

Should you desire to enter into any business requiring an immediate payment of more than the first twenty-five hundred dollars from here, it would be easy for you to borrow the additional amount necessary, at 5% per annum, while your capital remaining here would be drawing not less than 6%, and probably more, thus insuring you a profit on the investment.

Thus, in a period of eighteen months, at the outside, full payment would be made you, with interest on the shares remaining, in the form of dividends.

Should this proposition meet with your approval, on advice by letter, or, preferably by Cable, I shall at once send forward the necessary papers, with Draft, to complete the first part of the transaction.

This will consist of a Bill of Sale of twenty-five of

the Capital Stock held by you, and to be signed by you, together with a draft for $2,500.00.

From a Draft received I note that you are, or have been in Lexington, Ky., and I hope, while there, that you enjoyed your stay.

Dr. Monsarrat is curious to know if you met his wife while in that city. [116]
2

From the papers you will have learned of the death of Doctor Day. It was very sudden and unexpected.

To Mrs. Rumsey I send my best respects and, with kind regards remain

Yours very truly,
(Signed) GEO. W. SMITH.

P. S.—I would not expect, nor, in fact, would I want you to resign the office that you now hold until the amount had been reduced, at least three quarters, or until the end of the present year.

Yours very truly [117]

BENSON, SMITH & CO., LTD.
Cor. Fort and Hotel Streets.
Honolulu, T. H., Nov. 14th, 1906.

Mr. S. L. Rumsey,
Denver, Col.

Dear Sir:—

Under date of the 18th, of June last I addressed you a letter in reference to your interest in this firm. Up to the present date I have failed to receive a reply from you. My letter was, at least, entitled to the courtesy of a reply and, on rereading the carbon

copy of the letter I am at a loss to understand why it was not answered.

I deem it only proper to say that the subject matter of the letter, as a business proposition, is one that should be taken up, considered and replied to at an early date.

From Dr. Monsarrat we learned of your stay in Lexington Ky., and I trust that the change has been of benefit to your health and strength.

With respects to Mrs. Rumsey and kind regards to yourself I am,

Yours very truly,
(S.) GEO. W. SMITH. [118]

PHOENIX HOTEL,
CHAS. SEELBACH, Mgr.

Lexington, Ky., Dec. 25, 1906.

Mr. Geo. W. Smith,
My Dear Sir:—

In deference to your wishes embodied in your letters & also conversation with me I tender my resignation as Vice President & director of Benson, Smith & Co., to take effect as of 31st. This will reach you in ample time for annual meeting. I regret this necessity more than I can say or you realize. I desire you to dispose of all my stock at as early a date as possible as I am in need of available funds & I can invest at 15% in safe investment west if I do not embark in business. When I wrote you a year & half ago in regard to my return I had in mind marriage & further investment on the house.

Have been anxiously looking for stmt of my a/c bus & the doings there in bus.

With Christmas greetings to you & yours with best wishes for future prosperity & welfare of the house & kindest regards to each one & all friends,

I am very truly yours,

(S.) S. L. RUMSEY. [119]

Honolulu, T. H., Jan. 22d, 1907.

My dear Rumsey:—

After a long silence I now have your letter of the 25th, of December, written in Lexington, prior to receipt of which the house had your draft for $500.00, from Denver.

I have carefully gone over your letter and note all that you have to say in regard to the business. You are mistaken in thinking that I do not appreciate the regret that you feel in having to give your connection with the business, I appreciate it fully but, on the other hand, I realize, as you do not, the changes that have taken place in the business since your departure, now three years ago.

There could never be a return to the old conditions, that is the conditions that prevailed while you were here. I would not consent to the substitution of the present Treasurer, Mr. McGill, and the younger men have all come up in their positions and, without my consent, they could not be displaced from their positions.

It is perfectly naturual and, under the circumstances, a perfectly natural change that we have to recognize no matter what the regrets.

I am now engaged in making the arrangements that will meet your wishes in the matter of funds, especially desiring to accommodate you with as large

an amount as possible. To the details of my letter containing the proposition you have not paid attention. I shall, therefore, take it for granted that, in the main, they are accepted and by the next mail, in a few days, I shall be able to send you the first installment. Herewith you will find a statement of your account as of the 31st, of December. You will note that you still have a substantial to draw against, even after the Draft of $500.00.

In this connection I would mention the Insurance Policy, on your life, in the New York Life Insurance Company, in favor of the firm, for the sum of $5,000.00. The annual premium on this is $232.30.

There have been three premiums paid thereon and the next one is due in June, 1907. This policy could be assigned to you, by the firm, *after the payments for all of your stock have been made and on the repayment to the firm of the amounts expended for annual premiums.* That is, if you should so desire it. The policy could then be placed for the benefit of your wife.

I shall continue to be interested in your welfare and your success and I trust that, from time to time, you will write me of yourself and of your whereabouts.

With kind regards to Mrs. Rumsey and yourself and with a reciprocation of your greetings, from the members of the house, I am

Yours very truly,

(Signed) GEO. W. SMITH, [120]

Honolulu, T. H., Feb. 4th, 1907.

My dear Rumsey:—

In confirmation of my letter of the 22nd of January I now enclose, (1), Annual Statement of the Auditors of the Corporation, and, (2), Annual Report as the head of the business.

By this same mail there will go from Bishop & Co., of this city, to the First National Bank of Denver, a Draft for the sum of Twenty-five Hundred Dollars, ($2,500.00), with a receipt attached, for your signature, acknowledging receipt of the amount as payment for Twenty-five shares of the Capital Stock standing in your name.

This amount will be followed, as soon thereafter as possible, with the additional amounts necessary to complete the transaction.

In the meantime the balance of the stock will continue to participate in the profits of the business, which for the year 1907, has been declared to be 1½% quarterly on the paid up stock. Payable at the end of March, June, September and December.

Tucker has promised to bring in your receipts, in full, and I hope to include them under this cover. If not they will follow by a later mail.

The winter here has been a particularly severe one. I do not remember in the twenty-seven years that I have been here so much thunder, lightning, and rain combined, in a short period of time, as we had in December and January. Today we have sunshine and it is particularly grateful.

With kind regards to Mrs. Rumsey and yourself I am

Yours very truly.
(Sig.) GEO. W. SMITH. [121]

Good Friday, Mch. 29th, 1907.

My dear George:

* * * * * * * * *

Yours of 1/22 you mention ins policy & its assignment *a*n payment of all premiums—My stock interests carries a limited benefit pro rata in all the policies issued for the benefit of the firm likewise limited pro rata liabilities as to premiums it looks to me as if a payment of my share in those premiums according to my holdings & not the full amt would be equity in the premises.

In taking over the policy I should prefer to do so at the June payment. Yours of Feby 4 wy annual stmt & report noted. While the business has increased the profits remain small & I note you have quite an additional burden in the acquisition of the Hobron stock & which I am now first informed of the transaction as well as the special meeting.

I was unable at the time to acknowledge personally the receipt of twenty five hundred dollars which I do now—knowing you would need promptly my receipt & identification slip thro the bank at the time. It came thro the Cal. Nat. Bank & altho I had no trouble to get identified the Bank sent it all to my room in bills & I had to send it to my bank—had I been away from Denver it would have compelled my return—while if it is sent to the First Nat. Bank

here as you advised me I could have phoned them to place to my credit or write them if away my L/c book List the 1st Nat. Bk. as Bishop & Co., correspondents & I have credit there & am acquainted & they always know my address—The bk messenger could not tell me how the Bk of Cal sent it he presumed by wire—I was somewhat disappointed the amt was not larger for the reason I am now very anxious to close up all my outstanding business & get it in hand where I can personally manage it I can now get 15% on it without work—nett 10% & as I am not in receipt of income or salary need the add nine P. C. I must get to work at something & soon. This loss of time lately has been a hard blow. I would ask you to forward as large an amt as possible & if you can not see your way clear to send all to forward me the bal of the undisposed shares of stock that I may have them here. The amt thus far is too small to accomplish an investment with.

* * * * * * * * *

I remain very sincerely yours,
(S.) S. L. RUMSEY, [122]

Honolulu, April 11th, 1907.

My dear Rumsey:—

I have your letter of the 29th of March and learn with much regret that you have been seriously ill. I trust that you have fully recovered and that no untoward results will follow.

A careful reading of your letter indicates that my letters of the 18th, of June 1906, and 22nd, of January, 1907, have not had the careful reading to which the importance of the contents entitled them.

I will take up the subjects in order and reiterate some the points previously made.

My letter of the 18th, of June last contained a definite offer on what, after careful consideration, I felt would be just to the business, without placing it in any jeopardy and without in any way jeopardizing your interest. With this latter I was more concerned than anything else.

I felt that any move I made must be of such a nature that your interest would be fully protected, particularly if anything should, by chance, happen to me. The letter was dated June 18th, 1906. Your reply thereto was dated Dec. 25th, 1906, or more than six months after the offer was written. In the letter, containing the offer, I asked that you reply at once, by Cable preferably, for the reason that I had at that time the preparations all made for immediate action in the premises and could have put in possession of the first payment at once. Thus, by this time you would have been in possession of $5,000.00, had the action been taken as promptly as I desired. In fact, in your letter of the 25th of December you made no reference whatever to the offer. I was compelled therefore, to take it that the proposition was acceptable to you.

Every effort will be made to meet your wishes in the way of early payments but nothing will be done that would in any way place in jeopardy either the business or your holdings. Further, reference to my letter of June 18th, will show you that I did not ask you to resign your position as an officer until the complete payment had been made.

METHOD OF PAYMENT. Bishop & Co., advised us that payment would be made through the First National Bank of Denver and, on this advice I so wrote you. If the payment was made through another Bank it was in all probability done by the Bank of California, for which we are not to be blamed. I will endeavor to have the next payment made so as to meet your convenience. The receipt for the first payment arrived in due course and has been filed.

INSURANCE POLICY. If you will refer to my letter of the 22nd, of June, 1907, you will note that I did not ask you to take over the Insurance Policy. I suggested to you that you might want to take it over and have the policy changed, naming your wife as the beneficiary. I did this in view of the fact that you could not, now, secure insurance on your life. As a matter of fact the business would prefer to carry the policy as an investment. The question of the equity is one that would work would both ways [123] and, carefully figured out, would amount to the payments that have been made on the policy. We will, therefore consider this matter as closed.

LODGE DUES. I had, previously, asked Tucker to present all of the bills for Dues and thought that all had been paid. I have now asked him to bring in everything in order that we may pay all dues.

P. C. ADVERTISER. This matter was attended to at the time of your first request. The office now tells me that the matter was overlooked and the Semi-Weekly will, hereafter, be sent, as you desire.

CERTIFICATES OF STOCK. These go forward by the present mail, Registered, and adjusted to meet the new condition and to facilitate the purchase by future payments.

BULLETIN AM. PHARM. ASS. These have been collected and are being mailed to you.

PERSONAL EFFECTS. These can remain here subject to your order at any time. The Masonic Certificate I send, Registered, by the present mail.

This brings to mind that, after a careful search through your last letters I fail to note that you have acknowledged receipt of the box sent you, by Wells Fargo Express. This contained your tine box of Documents and other papers belonging to you. PLEASE ADVISE ME OF THIS IN YOUR REPLY.

Under *anoth* cover I send you a marked copy of the "Advertiser" in which you will note the announcement of the death of my brother, in Chefoo, China. I know nothing of the particulars as yet. A Cablegram arrived on the evning of March 20th, anouncing that he had died that day, I feel the loss keenly as *t*he is the last, but one (myself), of four boys. I was with him, in San Francisco, last year when on my way to Washington.

With respects to Mrs. Rumsey and continued good wishes for your welfare I am, with kind regards,

Yours very truly,

(Signed.) GEO. W. SMITH. [124]

Honolulu, T. H., July 8th, 1907.

Mr. S. L. Rumsey,
Denver, Col.

My dear Rumsey:

* * * * * * * * *

By this same mail there will go from Bishop & Co., through the Bank of California, and the correspondents of the latter in Denver, an advice of credit for $2,500.00, this amount to be paid to you on your receipt and delivery of Twenty-five Shares of the Capital Stock now in your possession. This complete the payment of $5,000.00, this first six months of this year and I hope to be able to accomodate you with the balance by the end of the present year or the early part of 1908. I consider that your desire to secure, at as early date as is possible, the amount of your investment, is one that should have first attention and, to that end, I am working the financial income of the business without, however, jeopardizing the general interests of the house or the credit of the Corporation.

* * * * * * * * *

Yours very truly,
(Signed) GEO. W. SMITH. [125]

S. L. RUMSEY,
801 North Nevada Ave.
Cor. Dale St.,
Colorado Springs,
Colo.

Aug. 8/07.

Mr. Geo. W. Smith,
Honolulu.
Dear George:

* * * * * * * * *

I never wish to jeopardize any interest of those connected with the establishment. Any penalty it seems must come from me in the premises & I am not complaining. I had hoped you would be able to so manipulate the stock there at that time that you could retain control & at the same time enable me to realize on it.

* * * * * * * * *

In yours of July 8 enclosure of receipt & stmt of my a/c wy' Dft. for $374.96/100. This letter I recd about July 18th. I am not yet in possession of advices of Bishop & Co. credit of 2500 & my bank (1st Nat. Denver) have not rec'd it. In this connection I advise you I have transferred to my wife Emma F. Rumsey my 75 shares of stock in the corporation & who will sign in the transfer hereafter.

I am confronted with the spectacle of drawing on my capital which to a bus' mind is rather disastrous. We had our winter weather in May here & I contracted Influenza during convalescence which was a set back. I am here for a change & expect to improve. I am sorry for Frear.

Where is Lacusta & Helen? I never hear.

With my kindest regards to you & yours & the firm

I am very truly yours,
(S.) S. L. RUMSEY,

I note the roar of the knockers on the Hospital periodically. [126]

Honolulu, T. H.,
Aug. 22nd, 1907.

Mr. S. L. Rumsey,
Colorado Springs, Col.

My dear Rumsey:—

By the "Nippon Maru," yesterday, I received your letter of the 8th inst, and take the opportunity offered by the "Aorangi" to reply at once.

I note that you state that you have not received the amount sent forward by Bishop & Co. For this omission I think that you can only blame your Bankers.

If you will refer to my letter of the 8th, of July you will note that I there stated that Bishop & Co., were sending forward the amount through the Bank of California, and the correspondents of the latter Denver. I only learned today who the Denver correspondents of the Bank of Cal., were but, with the information contained in my letter you, or your Bankers, could have easily ascertained this and the money could have been in your hands some time back, saving us, thereby, an item of interest that is of moment. On receipt of your letter I at once made inquiry who the Denver correspondents were and,

this morning, sent you a cable, "Funds Colorado National on your receipt only," and I trust you at once took the necessary steps to obtain the amount. Please bear in mind that all future payments will go through Bishop & Co., the Bank of California and the correspondents of the latter in Denver, not throug any other source.

I note that you state, (in your private letter to me), that you have transferred, (?), your shares in this corporation to Mrs. Rumsey. Permit me to say that this transfer is not recognized nor will it be of effect, for the following reasons:

1) Transfers, of stock, to be legal have to be made on the books of a Corporation by surrender of the certificates and the issuance of new ones, over the signatures of the proper officers. In the case of corporations, whose stock is on the market, this is an every day occurence and one that is not open to question. In the case of a close corporation, akin to a partnership, this can be done by and with the consent of those most interested and the signing of new certificates is within the judgment of the officers who control the majority.

2) No notice has been received or sent to the proper officers of the corporation that such a step is or was contemplated. Consequently no change has been made on the books.

3) An attempted transfer of this kind is direct violation of the implied understanding made when I admitted you into this business and one that is understood by everyone else that I have subsequently admitted into the business, viz., that in the event of

a transfer of the contemplated it, (the stock), must be first offered to those in the business before any other party is in any way contemplated. This you understand as well as the others concerned. [127]

4) This is in violation of a Proxy made by you, (and not revoked), in which you authorized me to act for you in matters connected with the business of Benson, Smith & Co., Ltd.

It was on your direct statement that you desired to invest your capital in some enterprise, in Colorado, whereby you could secure a larger return than you were receiving here, that I made the arrangement with Bishop & Co., to take up the stock in the way that it has been done.

To attempt to make a transfer the stock, while this matter is pending is hardly a business proposition. The balance of the Stock will contiue to remain on our books, in your name, until it is all taken up.

In dealing with this matter understand me perfectly. I intend and have to desire to make any reflection on Mrs. Rumsey for whom as your wife and a lady, I entertain the highest respect. I feel, as the founder and principal owner of this business that you have not done right in doing as you have done and I think that, when you consider the matter, that you will look at it the same way. I would not permit one of the juniors to make such a move and I cannot consent to it by any one else. I would not so do myself without the unanimous consent of the others being first obtained.

As soon as I am advised that the payment under way has been made I shall begin to arrange for the

next, further payment and, as set forth in my letter containing the original proposition, will make the endeavor to place you in possession of all your funds at as early a date as possible.

The summer months, June, July and August, have been very quiet for business, principally on account of the large departures, most of them temporary, and the lack of tourist travel. This will change after the first of September.

Our Mr. McGill has been on a four months trip to his home in Scotland and is due back here on Saturday, the 24th. On September 4th, our Mr. Gignoux leaves for a visit to his home in St. Louis and may, en route, visit you, going or coming.

I live in hopes of taking a trip next year, either to the U. S. or to China, to wind up my brothers affairs. This dream depends for realization partly on funds available and partly on the ability of our arranging for some one to care for Mrs. Richardson during our absence. She is now too feeble to be left alone.

The Queens Hospital affair made a lot of noise for a time and was a very trying ordeal for me. However, I kept perfectly Quiet and the public soon learned where the fault lay and were quick to render a verdict. I think that the thing is now settled.

We are fortunate, now, in having our new Commercial Club in full running order, in the new four storey building erected by McCandless on the corner of Bethel & King Sts. It is an institution that has long been needed here.

Lacusta and Helm I nothing of. Hackfeld & Co.,

know nothing of the former and friends of the latter state that they do not hear from him. [128]

Bishop Restarick leaves here on September 20th, for the General Convention and may, as he says, go via the norther route.

We have had with us, for a couple of weeks, the lawyer that defended Haywood, and I understand that he is a resident of Colorado Springs.

We all join in kind regards to yourself and Mrs. Rumsey and with best wishes for your improved health I am

Yours very truly
(Signed) GEO. W. SMITH, [129]

Colorado Springs, Colo., August 30, 1907.

Mr. George W. Smith, Pres. & Mgr.,
Benson, Smith & Co. Ltd.,
Honolulu, Hawaii.

Dear Sir:

I beg to submit the following as an equitable settlement of the insurance policy on my life as I view it and my rights therein. In the first place, so that you may understand my position I will give my portion of holdings in the company with respect to the entire capital stock:

*1st year,	10,000	Stock	as to	35,000	Capital
2nd "	10,000	"	"	50,000	"
3rd "	10,000	"	"	70,000	"
4th " ½,	7,500	"	"	70,000	"
4th " ½,	5,000	"	"	70,000	"

*The first year really one-half of 35,000 and 50,000 as the stock was increased to that amount Jan'y 1st as was the case in the fourth year.

If I should pay the company the total amount of the premiums, as suggested by you, since taking out the policy, the company would receive all benefits by the insurance on my life free of all expense to them, my stock receiving only its proportion of benefits during that time, while paying all liabilities pro rata. The fact that the company would have received the full amount of the policy had I died should be taken into consideration, as the right to receive the face value of the policy was a valuable asset, and was of considerable value to the company and of growing value each succeeding year while the policy remained in force.

My contention borne out by the facts is as follows: My stock has shared pro rata the liabilities and profits of the whole the same as the other individual stock, including the premiums on the policy together with interest thereon as well. Therefore, considering the fact that the company had the right to receive the full amount of the policy had I died, and also the fact that my stock has at all times borne its share in the payment of the yearly premiums, and has borne its share in the payment of all other debts of the company, I think it would be just and equitable for the company to now turn over the policy to me by my paying to the company the premium of the current year in proportion to my holdings of stock, that is, on September 11th to pay to the company three-quarters of this year's premium, which has now been paid by the company.

This would amount to your turning over the policy to me by my paying to the company three-quarters of

this year's premium, which has now been paid by the company, and would mean that all of the company's benefits and liabilities by reason of the policy would be cancelled as the company has already received all the benefit it is entitled to by reason of advancing the yearly premiums.

I might also add in this connection that having severed my connection with the company, and being no longer an officer or stockholder therein, the company although it might hold policies [130] on the lives of its present acting officers, now has no pecuniary interest in my life, and hence my llife cannot be insured by them nor can a policy be carried by the company on my life since my withdrawal and retirement from the company, although it might have done so while I was actually connected with the company as an officer.

The company has no right to continue paying premiums on the policy, and as the insured in the policy, I have a vested right therein, and according to its terms have a right to have it assigned and transferred to me or to my order.

I therefore request the company to deliver the policy to me by my paying to the company the amount of this year's premium as above suggested. It was my intention to take this matter up with the company as soon as I was able, but the president anticipated me in this matter some time ago.

I have talked the matter over with my wife who is now the holder and owner of my stock in your company, and we decided to submit this matter to you to show you the way we look at it at the present time. The transfer of my stock to my wife took place on

July 9th last, and all future dividends are payable to her.

Trusting you will give this matter your earliest attention, and that you will concur with us in the view we take of the matter, I am,

Very truly yours,
(S.) S. L. RUMSEY. [131]

S. L. RUMSEY,
801 North Nevada Ave.,
Cor. Dale St.,
Colorado Springs,
Colo.

Sept. 16/07.

Mr. Geo. W. Smith,
Dear George:

I am confirming my letters of Aug. 30 & 31st to you & have yours of Aug. 22nd. I am rather surprised in the stand you take in the matter of stock transfer. Mine is not a parallel case to former or present members of the firm. I transferred it because it was necessary, proper, & without any prejudice to the corporation. The transfer voids the proxy I take it —Of course your refusing to record the same is a matter for which you are responsible, it appears to me you are straining a very fine technicality knowing my circumstances. I cannot afford to have my affairs complicated & I am trying to manage them the best I can & shall continue to do so. I regret that my endeavors for the past twelve years to serve & please you have apparently failed. You have had the prilege to buy the stock for over a year when the propo-

sition first came up. I did not pledge it to any one or fail to safeguard it. I presume I should become involved in financial difficulties & yet hold it. It was bought & paid for by me & only the default of the corporation could deprive myself or order in realization, which result is not anticipated by me. I did not resign from the house voluntary or for illness solely to meet your wishes. I was ready & willing to return two years ago & so wrote you. You opposed it then & since it was a serious matter for me, but I accepted it. I could hardly ret' to Hon' & apply to the house for a position after years of connection, with the head in opposition to it.

I will be glad when this matter is settled for I can always have worries enough. I am working out my destiny at best & when in doubt take counsel.

The stock does not pass out of the family & is not *joe*pardized.

Your stock would have to change in case of death as well as my own or others.

I shall maintain my stand with the best of feeling.

With my kindest regards to all

I am sincerely yours,

(S.) S. L. RUMSEY. [132]

Sept. 25th, 1907.

Mr. S. L. Rumsey,
Colorado Springs,
Colorado.

Dear Sir:

I have before me a typewritten letter, signed by you, and dated the 30th of August, the contents of which have had most careful consideration and

thought. I take up the subjects in the order given.

HOLDINGS. You are in error in this first statement and the following figures show what your holdings were at different periods.

Period.	Holding.	Capital Stock
Jan. '98 to Apl. '02.	$ 8,700.00	$35,000.00
Apl. '02 to Mch. '04.	10,000.00	50,000.00
Mch. '04 to Feb. '07.	10,000.00	70,000.00
Feb. '07 to Aug. '07.	7,500.00	70,000.00
Aug. '07 to date.	5,000.00	70,000.00

The main subject matter of the letter is LIFE INSURANCE, and it may be well to review the subject, from the beginning, in order to revive in your memory the conditions under which Insurance became a feature of the business.

When, in 1903, I took out Life Insurance on my life in favor of Benson, Smith & Co. Ltd., for the sum of $5,000.00, (and in 1904 for $20,000.00, additional), I required that all of the stockholders, in active service with me, should take out policies of like amount each, viz., $5,000.00, in favor of the Corporation of Benson, Smith & Co. This was a requirement of mine and a refusal so to do, on the part of any one, would have justified me in asking for the retirement of the party refusing.

The object of this insurance was to protect the Corporation against a sudden demand for funds in the event of the death of any one of the principal stockholders.

The cost of this insurance, that is the payment of the premiums, has been borne by the Corporation of Benson, Smith & Co. Ltd., and has constituted an ex-

pense of the business the same as Fire Insurance, Rent, Exchange, or Interest, all of which is borne by the Corporation as a whole and not by any one particular stockholder in part or as a whole.

The Policies thus issued constitute an asset of the Corporation, as a Corporation, the same as Bills Receivable, Accounts Receivable or Stock on hand.

I have stated that the object of the Insurance was to protect the Corporation against a demand, from any particular block of stock, in the event of the death of the party to whom the stock was issued.

That object remains in force until the particular block of stock, covered by any one policy, is retired and covered into the Treasury. [133]

It does not become invalid even if a particular block of stock is transferred.

You are now seeking to destroy that protection to the Corporation by asking that the policy in question be returned to you.

You are no more entitled to ask for the return of the Policy, because the premium was charged to the Corporation expenses, that you would be to the return of a proportion of the premiums paid on Fire Insurance.

You fail entirely, to distinguish between the rights of a PARTNER in a business, (who is generally allowed to have the assets of the business divided in the event of retirement), and the rights of a stockholder in a Corporation, whose sole right is in his stock and who has no claim or right in any particular asset of a Corporation, all of the assets being held for the benefit of all of the stockholders.

This is a Corporation and not a Partnership.

You state that the Corporation has no right to hold a policy on your life. In this you are mistaken. The Corporation has a right to hold a policy on your life, on the life of the President of the United States, the Emperor of Germany or any other person on whom the Life Insurance Company will take a risk and provided the premium demanded is paid. This is a fact that is often made use of by speculators.

You state that you had intended taking this matter up but that I had anticipated you.

Reference to my letter of the 22nd, of January, '07, will show you that I suggested that you take over the policy AFTER all of your stock had been retired and on the repayment to the Corporation of the amounts expended for premiums. This suggestion remains in force.

You state that you are no longer a stockholder. The stock books of the Corporation fail to indicate that any transfer of your stock has been made, nor in fact has any been made. Even if a transfer had been made, such transfer would not in the least affect the protection required on the particular block of stock originally issued to you. When, in 1894, you came to me as a clerk, although a man of mature years, you had not succeeded in establishing yourself in life.

When I incorporated this business, in 1898, I gave you an opportunity, I was under no obligation to do so, I need not have done so, out of regard I did so.

When I undertook to retire your stock and pay you for it I burdened the business in so doing but, I was protecting your interest, protecting you against

loss in the event of my death, against loss in the event of inimical legislation, labor troubles or crop failure any one of which would ruin all interests here, dependent as we are on one staple for our very life.

In the foregoing subject of this letter I am incontestably right and, in that position, I am entitled to consideration from [134] you as much, if not more, than others with whom I have been and am associated.

In conclusion I beg to say that, as President and Manager of this Corporation, I decline to place in your possession the Policy in question or to entertain any financial proposition for its transfer until the stock which it covers is wholly retired.

With kind regards I am,

Yours very truly,

(Signed) GEO. W. SMITH,

President & Manager, Benson, Smith & Co. Ltd.

[135]

BENSON, SMITH & CO. LTD.

Druggists,

Cor. Fort and Hotel Streets.

Honolulu, T. H., Sept. 27th, 1907.

Mr. F. A. Wickett,

Cashier N. Y. Life Insurance Company.

Honolulu.

Dear Sir:

We beg to notify you that we are the holders of, and beneficiaries under, Policy #3442989, in the New York Life Insurance Company, on the life of SAMUEL L. RUMSEY.

We beg to notify you that this firm has always paid and will continue to pay, the Premiums on the above Policy, and that all notices relative thereto are to be sent to the undersigned.

Yours very truly,
BENSON, SMITH & CO, LTD. [136]

Oct. 6th, 1907.

My dear Rumsey:—

I have before me your letter of the 16th, of September. I will preface this letter by saying that in the matters that have been under discussion there is, on my part, only the best of personal feeling for you, no one regrets more than I the conditions that required the relin*g*uishment, by you, of active association in the business.

You state that you are surprised at the stand that I take in the matter of stock transfer. The office and place of business of the Corporation of Benson, Smith & Co., Ltd., is in Honolul, T. H.

Transfers of stock have to be made, like in any other corporation, by the presentation at the office of the corporation of the old certificates, with attest of sale, and the issuance of new certificates. This can only be done at the place of business of the corporation. I do not deny that you may have *assigned* your certificates of stock, but they have not been transferred and no record of same can be made on the books of the corporation under the circumstances. There is no technicality concerned at this end. Without notice and contrary to the implied agreement you notify me that you have transferred them. The authority for transfer resides in the proper offi-

cers of the corporation, assignment may be made by any individual stockholder, but the stock remains in the name of the original holder. This is the stand taken and it is no reflection on your labors or efforts while connected, actively, with the house.

The same would apply to me and my holdings and to any other of the stockholders. You state that I have had the opportunity to purchase for over a year. Kindly read over my letters of the 22nd of January, 1907, and the 18th of June 1907, also my letter of the 11th of April, 1907. Had the original offer been promptly accepted, as I least expected a prompt reply, the interest would now be closed out and you would be in possession of all of the funds.

You state that you did not resign from the house voluntarily but to meet my wishes. Again read my letter of the 13th of May, 1906, particularly the Postscript. I there stated that I did not expect you to resign any office until your stock had been fully retired. I deny that you were in any way forced out. In acting as I did, and have, I have working for your best interests as I think that you will ultimately acknowledge.

You state that you were willing to return, two years ago, and that I opposed it. Read carefully my letters of Sept. 19th, '05, Oct. 6th, '05 and Nov. 30th. '05. I think that I fully pointed out to you why a return was inadvisable, more from your standpoint than my own, or that of the business. Subsequent conditions have fully justified my judgment, made then, more particularly from the standpoint of your physical condition.

I do not admit that stock would have to be "transferred" in the event of death. That is a matter that is provided for the [137] very fact that I had anticipated this in providing Insurance, to protect the business and to further protect those that would be left when death does come. The business has promptly met the proposal as first given by me in the redemption of your holdings, it is my firm determination that it shall continue to do so. It has been a burden but, as far as I am concerned, a willing one. It will be continued as rapidly as is possible, without jeopardy to both interests, and, when the matter is accomplished, then happen what may, to me or to the business, you, at least, will be protected. This is the stand that I take, the object that I have been working for, any other associate would not have the consideration that I have given to this case nor the benefit of the work and denial that it has, and is, requiring.

With kind regards and best wishes to Mrs. Rumsey and yourself I remain,

Yours very truly,

(Signed) GEO. W. SMITH. [138]

S. L. RUMSEY,
801 North Nevada Ave.,
Cor. Dale St.,
Colorado Springs,
Colo.

April 22/08.

Mr. Geo. W. Smith,
President Benson, Smith & Co., Ltd.,
Honolulu, Hawaii.

Dear Sir:

As I have not received the liquidation for the stock from you as promised & to which you agreed to send in Dec. or Jany. last am at a loss to understand just what your attitude in the matter is. For the past four years you are aware I have been drawing on my principal & need to so conserve my funds to the best advantage. If I had double the amt. & at double the income I have been receiving I could not live on it.

Your members each of you are making a living even with dividends withdrawn. I am not. You are doing the work. I am not. On that basis I am entitled to my investment. The corporation has saved my salary in the four years & dividends in part. I receive nothing for my investment. I should receive interest in lieu of income at least. In view of the fact that I can do much better now & am compelled to do it I must of necessity embrace relief methods to that end. I could have controlled a bus here the end of year that would net six thousand a year on an investment of 15,000 had I that money in hand. I had to let it pass. I cannot wait for something to turn up. You hold up my stock pass divi-

dends—what remains for even my temporary relief. You would refuse me the right of transfer yet provide no remedy. The mentioned burden of taking this stock is offset by corresponding reduction in liabilities. You withdraw my position & salary hence you did not consider it a loss to the business. Yet paradoxically you do by withholding the insurance policy. I have done all I could to facilitate matters as you wished them leaving myself out of consideration.

Though a stockholder you have decided I am not entitled to report of annual meeting. Hobron was your enemy as well as competitor yet he must be provided for & I not. Tho a director at the time of the taking over I am in ignorance of the cost of the transaction to the house.

You are asking me to carry a burden entirely beyond my capacity. I have deferred writing hoping meanwhile to receive the balance & transmit stock held. The stock is worth something or nothing. I believe it is worth its face value. Your letter of Feby. 16 gives me no advice as to why you did not take it up as you had agreed. I would like you to send me the proxy I left with you when leaving the Islands as its purpose is no longer in force. [139]

From your letter I take it you are carrying a larger stock than the bus would seem to warrant & while the volume of business increases the profits decrease from year to year. As you had provided for the taking over of my stock I did not anticipate the temporary flurry to intervene. I paid you 7% when I was taking up the stock until paid for but do not recol-

lect that you allowed me interest on any balance I had with you from time to time tho there was no agreement as to that & I did my banking thro the house. I trust you will see a solution of this matter that will enable me to realize at once.

With regards to all, I am very truly yours,

(S.) S. L. RUMSEY. [140]

May 16th, 1908.

Mr. S. L. Rumsey,
Colorado Springs, Col.

My dear Rumsey:—

I have your letter of the 22nd of April, the tone of which is, to say the least, peculiar, and I can only attribute this to the condition of your health.

The wisdom of keeping copies of all letters written is fully evidenced in the present case and I turn to the copies of my letters to you in order to answer, seriatim, your present letter.

I ask, in justice to myself, that you take up the originals and reread them carefully.

LIQUIDATION OF STOCK INTEREST. In my letter of June 18th, 1906, I made a definite offer and outlined a plan for taking up your stock in the Corporation. I asked therein that you notify me at once, preferably by Cable, of your acceptance of the offer as I then had the arrangements made. This letter reached you not later than the 6th of July, 1906. Not hearing from you I again wrote under date of November 14th, 1906, calling your attention to the offer.

My next letter from you was dated December 25th, 1906, and in this letter you tendered your resigna-

tion as an officer of the Corporation but in no way did you refer to my offer. I was at a loss to know what to do. My arrangement with the Bank had expired because six months had elapsed (from June, 1906, to January, 1907), between the making of the arrangement and the first receipt of an advice from you. Had you promptly accepted the offer your interest would, ere this, have been retired and you would have been in full possession of all of the funds. I at once began new arrangements and, in due course, you received the sum of $5,000.00, when, shortly after the last payment, came the financial panic on the mainland and the successive effect here, fully described in my letter of the 16th of February, 1908.

In all of my letters to you on this subject I have repeatedly stated that any move in the matter would be made only in such a way as not to jeopardize the business or your interest therein. In this I have been faithful to the letter.

It may be of interest to you to know what Bishop & Co., had to say in regard to our move to purchase your stock interest.

In a letter, dated June 13th, 1906, they had to say:

"The Principal Question Which has Been Raised in Connection With Your Proposal for the Purchase of Mr. S. L. Rumsey's Holding of $10,000.00, in Your Corporation, is Whether a Company is Entitled to Purchase Its Own Stock, or Whether Such a Purchase Could be Set Aside at the Instance of Any Creditor as Illegal. The Authorities are Divided on this Point, but it Seems Generally Established in America that a Company may Purchase Its Own

Stock Provided the Purchase is Made Out of Profits, and the Assets are not Thereby Decreased Below the Amount of Capital and Liabilities." [141]

This was the opinion of the Bank's Attorneys and, in spite of the objection and, further, that our liabilities were, at the time, large, I succeeded in making the arrangement whereby one-half of your interest has already been retired.

INTEREST IN LIEU OF INCOME. Interest is not paid by any Corporation to its stockholders on their holdings of stock. Interest is paid on borrowed money but not on stock. In a purchase of stock a *quid pro quo* is given, in the shape of Stock Certificates, on which a dividend may or may not be paid.

SALARY. The salary formerly paid you for services rendered to the business has not been saved to the business for the reason that another has taken the place held by you. A salary could (and did), go on for some time in the event of illness or unavoidable absense but not indefinitely.

INTEREST PAID. You paid interest on your notes, while taking up the stock, and, whether you paid the interest to me or to the Bank, makes no difference in the fact. It was a business transaction into which you entered voluntarily. I, too, at the same time, was paying interest on monies that had gone into the business for your benefit as well as mine.

I quote from your letter, "You hold up my stock and pass dividends." I deny that your stock has been, or is being held up.

I have been and am at work to secure the means to relieve you of the stock. Why were Dividends passed at the annual meeting of this year For the reason that $5,000.00, of the funds of the business had been withdrawn to purchase 50 shares of the Stock of S. L. Rumsey. You are not the only sufferer on on this point.

I quote again. "You would refuse me the right of transfer of my stock." I deny that I have refused you the right of transfer of your stock. In my letters of Aug. 22nd, and Oct. 6th, 1907, I set forth fully the only way that stock could be transferred.

The opinion therein given was not my own but obtained from a firm of attorneys in this city and, further, confirmed by consultation with officers of other corporations.

I quote again. "You withdraw my position and salary." This is untrue and you knew it to be so. Kindly refer to my letters of the 18th of June, 1906, and April 11th, 1907, wherein I clearly stated that I did not desire you to resign your position until at least three-fourths or all of your stock had been taken up. Your resignation as Vice-President was contained in your letter of Dec. 25th, 1906, from Lexington, Ky., was voluntary and unasked for.

Your relinquishment of your salary was contained in your letter of October 19th, 1904, from Colorado Springs, and was wholly voluntary and came as a result of a criticism that appeared in the report of the Auditor and not from anything asked for by me. [142]

INSURANCE POLICY. This subject was fully covered in my letter of Sept. 25th, 1907. The opinion therein given was, again, not my own but came from the attorneys above referred to and from the insurance Department of Bishop & Co. I would render myself liable to indictment were I to turn over to you an asset of this nature without receiving the compensation asked for in my advices on the subject.

I quote from you again. "Though a stockholder you decide that I am not entitled to a report of the annual meeting."

This is a malicious misstatement. I find, by referring to my letters that you regularly, since you left here, received the annual reports. When my letter of February 16th, 1908, (the last one), went forward the report of the Auditors had not been handed in and the annual meeting was not held until March 6th, 1908.

Pending receipt of your reply to my letter of February 16th, 1908, I have been holding on my desk a copy of the report, ready to forward to you. This I do with present enclosure with my comments attached thereto.

You state, "You are doing the work, I am not, on that basis I am entitled to my investment." Apply this argument to any mining or other Corporation that you may be interested in. Is it an argument that would cause the corporation to relieve you of your stock? I think not. You say, further, "You are asking me to carry a burden beyond my capacity." I have asked nothing of the kind. I have not

even received a definite acceptance of my offer of June 18th, 1906.

I have had to take that for granted and I have strained the Business to relieve you of a part of your holdings already.

HOBRON DRUG CO. PURCHASE. This matter was acted upon at a Directors meeting, held for the purpose, and at which a majority of the stock was represented, Careful consideration was given to all of the facts entering into the matter. It was, finally, deemed a wise move to take over the business, as a protection against future trade war and as making for future prestige and trade increase and the same result would be reached were it to be again considered.

The inventory of the stock was conducted by the attaches of this house. The prices applied to the goods were taken from the Price Book of Benson, Smith & Co., and not from Hobrons cost. In many instances a deduction of 10%, 20%, and even 50%, was made from the cost to bring the article to what was considered its value.

The total Inventory finally amounted to $34,000.00. This included the stock of Merchandise, Furniture & Fixtures, Trade Marks etc.

In payment for this Hobron took $10,000.00, of the Capital Stock of Benson, Smith & Co., and the balance, $24,000.00, was made payable over a period of three years. One half of this has now been paid.

The fixtures from Hobron's were removed to our present store, (the old fixtures being taken out), and fitted into place making [143] a much needed im-

provement and change in the store. The result of the purchase has justified the action taken. The large increase in custom and trade has been beneficial to the business and, instead of falling behind, this house has gone ahead.

In conclusion I desire to say that I am now and shall continue work looking to the taking up of the balance of your holding.

This will be done as fast as local financial conditions will permit. It will be done, as stated several times previously, when it can be done *with* jeopardy to all interests.

I have protected and looked after your interest as carefully as I have my own, yes, even more so, for, in order to take up the part of your interest, I have had, and those actively associated with me have had to forego profits on shares, in the way of any dividends. It will be done, by the Directors, at the proper time and on their own judgment and not as the result of any demand.

With kind regards, I am.

Yours very truly,

(Signed) GEO. W. SMITH.

Enclosures. Proxy.

Copy of Report.

McGonagle will be in Denver as a Delegate to the Nat. Dem. Convention. [144]

Sept. 20, 1910.

Mrs. Emma Forsythe Rumsey,
Paso Robles Hot Springs,
Paso Robles, Cal.

Dear Madam:

In April last you offered for sale through the First National Bank, of this city, your stock in the Corporation of Benson, Smith & Co., Ltd.

At that time the Corporation was not justified in withdrawing funds for the purpose of making the purchase.

The Corporation is now prepared to take over the stock, consisting of Fifty Shares standing in your name.

If the stock be sent to Honolulu, through any Banking house, we shall pay over the Par Value of same on receipt of notice that it is ready for delivery.

You have the personal sympathy of the writer in the loss you have sustained by the death of your husband, Mr. S. L. Rumsey, formerly connected with this Corporation.

With respect, I am

Yours very truly,
BENSON, SMITH & CO., LTD.
(Signed) GEO. W. SMITH,
Pres. & Manager.

GWS/JKS. [145]

Benson, Smith & Co.,
Honolulu,
Hawaiian Islands.

Gentlemen:

I beg to acknowledge the receipt of your letter of recent date in which you express a desire to take up the stock I hold in the firm of Benson Smith & Co. I have submitted my views in the matter to our Lawyer in Denver, Mr. T. J. O'Donnell, and he will communicate them to the firm. Personally I deplore the fact that it could not have been settled during my beloved husband's life-time, for the pleasure and comforts he needed. I thank Mr. Smith for his kindly expressions of sympathy.

Believe me,

Most sincerely yours
(Sig.) EMMA F. RUMSEY.

Paso Robles Hot Springs.
Paso Robles, California—October 8th, 1910. [146]

Nov. 1, 1910.

Mrs. Emma F. Rumsey,
Paso Robles Hot Springs,
Paso Robles, Cal.

Dear Madam:

In a recent letter from your attorneys, Messrs. O'Donnell & Graham, we are asked in reference to some items left here by Mr. Rumsey.

Prior to his departure, he stored in our Warehouse two trunks, one suit case, and five boxes; these are intact and the contents unknown to us. There is, also, a steamer chair, (an old one) and a clock. We

have never had a list of the items but, if one is furnished us, we can probably identify them and they are subject to your instructions and disposition.

We renew the offer for your holdings of stock in this corporation and, in order that you may not be put to the expense of Bank Exchange and collection, we are, this day, established a credit of $5,000.00, with the Colorado National Bank, Denver, Colorado.

This amount will be paid to you on the surrender, to the Bank, properly endorsed, the Certificates of Stock now standing in your name.

Your attorneys are, also, advised of the Credit.

With respect, we are

Yours very truly,

(Sig.) GEO. W. SMITH.

GWS/JKS. [147]

PALACE HOTEL,
San Francisco.

December 2, 1910.

Benson Smith & Company,
Honolulu, Hawaii.

Gentlemen:

I received your letter of recent date. I forwarded immediately a copy to Mr. O'Donnell and he has doubtless written to you. I desire to thank you personally for your courtesy in extending to me the use of your warehouses, for the storage of my husband's small possessions. I have a list in Los Angeles as nearly as I can remember, Louis said there is a clock on Mr. Smith's desk describing it. A very good and rather expensive steamer chair, which he wished me to use in going to the Orient, or on a return trip here

from Honolulu. The balance is perhaps clothing, and things of interest to the Rumsey family only. I shall come and go through them and relieve you of their care as soon as it is practicable and my own health permits. I doubt if they are worth the freight to send them and I have no fixed address now. I have much sentiment about them as I have for everything conected with him, and shall be grateful if you will continue to keep them just as he left them.

I have a sentimental attitude also about the stock in your firm and the settlement of the insurance matter, i. e., to settle it only according to his own point of view. I know, as Mr. Smith must, his lofty principles that nothing could induce him to claim or accept aught but his very own. I was and am, willing to compromise the whole matter, and sell the stock to the firm as Mr.O'Donnell wrote you. You declined the offer, as you have since 1906 and 1907, declined all of Louis' offers, and the matter seems closed until the Court determines who is right about the insurance and the stock I may hold indefinitely (as I do not now particularly need the money) or I may sell it here or elsewhere at my convenience, if I can do so to a good advantage, or I may leave it as a legacy to two young nieces, who are my favorites and my principal heirs.

Louis had many years of thought about this settlement, and in those years, some privations because he could not affect one, and yet never changed his mind as to what was due him. His decision must be mine.

I shall be at the Palace a few weeks, a letter sent

her will no doubt follow me if I do not receive it here.

I am Very truly yours,

(Signed) EMMA F. RUMSEY. [148]

Dec. 14, 1910.

Mrs. Emma F. Rumsey,
Palace Hotel,
San Francisco, Cal.

Dear Madam:

Your letter of the 2d inst., addressed to the Company, was received.

The policy on your husband's life having been taken out in the name of the Company and for the Company's benefit and all of the premiums having been paid by the Company, it does seem to me only just that it should receive the amount of the policy. With the advice you have, you will necessarily hold the view you have; and therefore, as you state, the insurance matter is "closed until the court determines who is right about it." There is another reason why the question should be settled by the Court; The Company holds other policies which were issued under the same conditions and for similar purposes, and it seems to me the prudent thing to have the question settled, once for all, whether or not the Company is to receive the benefit of moneys it expends for premiums on these policies or some other persons. Under these circumstances, you will see that it is impossible for the Company to withdraw its claim to the moneys payable pursuant to the policy which you ask it to do.

Every year the Company takes stock, its books are made up, a statement of its affairs prepared and a

copy of this statement sent to each stockholder. In conformity with this practice, a copy of the statement was sent every year to Mr. Rumsey during his life. Such a statement will be made out in the usual way early next year and a copy will be furnished to you, as well as the other stockholders. As such a statement can only be made after stock taking, you will see that it cannot be furnished at short notice, as Messrs. O'Donnell & Graham seem to think, nor would the directors of any company be justified in having such a statement made, at any time, merely on the request of a shareholder.

$5,000.00 has been offered for the 50 shares you hold; the price Mr. Rumsey was agreeable to accept for them on April 1st last. I do not understand from you, or your attorneys, that you refuse the offer. If you desire to sell them and will state, either now or after you have received the Company's statement next year, what you will sell your shares for, I shall take care the offer will be considered.

Messrs. O'Donnell & Graham do not seem to me to construe the corporation's letters fairly and, therefore, it is not advisable to continue the correspondence with them.

As an illustration of what I mean I send you copies of our letter to O'Donnell & Graham under date of November 1st and of their reply thereto dated November 22d.

With assurances of respect, I am

Yours very truly,

BENSON-SMITH & CO. LTD. [149]

CABLEGRAM
VIA COMMERCIAL PACIFIC.

Jan. 19, 1911.

Emma F. Rumsey,
Palace Hotel,
San Francisco.

Personally accept offer six thousand payable Honolulu. I confirm by letter.

SMITH. [150]

Jan. 23d, 1911.

Mrs. Emma F. Rumsey.
San Francisco.
Cal.

Dear Madam:

Your letter, from San Francisco, dated the 11th, of January, 1911, reached me on the morning of the 18th inst.

The most careful consideration was given by me to the contents of your letter and I noted particularly your offer to dispose of your stock amounting to Fifty shares in the Corporation of Benson, Smith & Co., Limited, for the sum of Six Thousand Dollars, Cash.

This offer brings the matter back to the letter from the Corporation, addressed to your Attorneys and dated June 28th, 1910, in which the Corporation offered to surrender the Policy of Insurance and pay an additional $1,000.00, for the shares of stock. Had this offer been accepted, at the time, the delay, unnecessary correspondence and litigation would all have been avoided.

I noted, further, that you did not care to remain in San Francisco any longer than compelled to and your request that I cable you my acceptance of either offer. In order to comply with your wishes I sent you a cablegram on the evening of the day your letter reached me advising you of my acceptance of your offer to sell the stock for Six Thousand Dollars. You further stated that, if your offer was accepted, you would immediately send the Certificates through a Bank.

I have arranged here to borrow the necessary amount and, on being advised that the Certificates are here and to be delivered, I shall promptly pay over the amount to the Bank holding same.

The matter of the Insurance Policy will, we mutually understand, be settled by the Courts in Denver, Colorado.

In all the correspondence over this matter the Corporation has been advised and instructed by its retained attorneys, gentlemen of high standing in the profession both here and on the mainland.

Any apparent reflections that you or Mr. O'Donnell may have taken exception to, in the correspondence, were addressed to Mr. O'Donnell the *Attorney* and were in reply to sinister insinuations made in letters to the writer or to the Corporation.

No offense was intended to Mr. O'Donnell personally, as a gentleman.

Several statements in your letter call for a reply from me and I can only attribute their being made to the fact, (as you state), that all of Mr. Rumsey's

papers and correspondence are in the hands of your attorneys in Denver.

In justice to myself I feel that the statements ought to be answered. Fortunately I have kept copies of all my correspondence.

You speak several times of the "Firm." This company has not been a firm since 1898, now thirteen years ago. Prior to that [151] time it was owned solely by the writer. In 1898, in order to relieve myself of some responsibility I incorporated the business placing some stock in the names of two employees, (Mr. Rumsey at that time being one of the employees), and some shares in the name of two trusted friends, with the privilege of paying for the stock out of the earnings of the business. Eighty-seven shares were allowed Mr. Rumsey which, in due course were paid for out of the earnings. Later Mr. Rumsey secured thirteen more shares, of the Treasury Stock, paying for same with some monies derived from a legacy received on the death of two maiden aunts, in the east.

Therefore, no one associated with me existed in the sense of a "Partner," which is a much closer, (business), relation and the responsibilities are different and unrelated.

You state that he was "practically put out of it," meaning the Corporation. To this I must take exception.

I have now before me, as I write, a letter from Mr. Rumsey, dated from Colorado Springs, October 19th, 1904, in which he voluntarily relinquished his salary from the Corporation on account of his inability

longer to take part in the work of the Corporation and on account of a criticism in the report of the Audit Company with which I had nothing to do. See reference to this in my letter to him dated May 16th, 1908. Furthermore refer to my letters of June 18th, 1906 and April 18th, 1907.

I have also before me a letter written by Mr. Rumsey under date of December 25th, 1906, from Lexington, Kentucky, in which he voluntarily tendered his resignation as an officer of this Corporation.

For reference to this see the postcript to my letter of July 18th, 1906 and my letter of May 16th, 1908.

I do not refer to these matters to cause you pain, but to correct an impression you seem to have and which I can only attribute to the fact that you have not the correspondence before you.

INSURANCE POLICY. You state that I first offered the Policy.

Kindly refer to my letters of Jan. 22nd, 1907, April 11th, 1907 September 25th, 1907, wherein I suggested the advisability of taking over the Policy, refunding the premiums that the Corporation had expended. This brings us again to the Corporation's offer of June 28th, 1910, when the Policy was offered in part payment for the stock.

This offer was made on the advice of the Attorneys and, at the time, June 28th, 1910, I was in Portland, Oregon endeavoring to recuperate my health. The substance of the offer was cabled to me and I replied by Cable approving of same.

If you have not copies of the letters of Mr. Rumsey, referred to, I can have copies made here and cer-

tified to before a United States Commissioner. [152]

I repeat, I am not seeking to cause you pain or in any way to reflect on Mr. Rumsey. I am fully aware that a man in a sick condition looks at matters in a different light than when he is well.

Of my relations with Mr. Rumsey, first as an employer and later as an associate, I have pleasant memories. That the delay in the settlement of his interest was not due to any wish or want of effort on my part I have fully set forth in my letters to him which you now have.

I believe that you are fortunate in disposing of your interest for two reasons. First, stockholdings in a Mercantile venture are always an element of risk, depending for stability on the fortunes of trade, force of competition and steadiness of income, depending on the general character of the place where the business is located.

In this country, where we are dependent on one industry, Sugar, the risk is even greater.

Second, on the personal equation of those in charge of the business. In referring to this I write without egotism. From a business experience here of now thirty years I have established a personal reputation, among the Bankers and business men, that is an asset of the business and that is personal in its nature.

I may be taken at any time, we never know when. This would deprive the business of my presence and leave it in charge of younger men who have not, as yet, established the reputation or secured the confidence referred to. The business would, in all probability, go on but, in the meantime, the interests of

others would, to a certain extent, be in jeopardy. I preferred, therefore, that outside interest, like yours, should be retired as soon as possible. My own interest will be automatically retired by Insurance provided for that purpose.

I have written you fully and frankly on this matter, the same as I would with Mr. Rumsey were he still with you.

PERSONAL EFFECTS. I shall await your instructions in this matter.

We have been compelled to vacate our Warehouse owing to building changes made by the landlord, and now occupy inconvenient quarters pending the erection of a new building. The effects are stored.

In concluding this letter, I desire to assure you of my personal respect and esteem and to remain, Madam,

Yours very truly,
(Sig.) GEO. W. SMITH. [153]

Feb. 13th, 1911.

Mrs. E. F. Rumsey,
Palace Hotel,
San Francisco, Cal.

Dear Madam:

On the morning of Saturday the 11th. inst. the First National Bank, of this city, notified me that they had the Fifty Shares of the Capital Stock, of Benson, Smith & Co. Ltd., standing in your name, sent to them for sale.

At 11:30, on the same date, I paid into the Bank the sum of $6,000.00, and received therefore, the shares in due course and in accordance with the offer

contained in your letter of the 11th, of January 1911, and my acceptance thereof, contained in my Cablegram of January 19th, 1911, and confirmed in my letter of January 23, 1911. The matter, therefore, is now a closed one.

I thank you for the expressions of esteem contained in your letter and remain, with respect,

Yours very truly,

(Sig.) GEO. W. SMITH. [154]

V.

That in a certain suit instituted by the said Emma Forsyth Rumsey against the said New York Life Insurance Company on the 15th day of August, A. D. 1910, in the District Court of the city and county of Denver, State of Colorado, hereinafter more particularly referred to, there was duly filed and received in evidence upon the hearing of said cause the deposition of the said George W. Smith, then President of the said Benson, Smith & Company, Limited, the deposition of the said Alexis J. Gignoux, then Secretary of the said Benson, Smith & Company, Limited, and the deposition of the said William A. Purdy, then Agent as aforesaid in the Territory of Hawaii of the said New York Life Insurance Company.

That the following are true and correct copies of each of said depositions including all direct and cross interrogatories and all of the answers of the said deponents respectively thereto. That said depositions and the direct and cross interrogatories and the answers thereto bear upon and relate to the matters in controversy in the above-entitled cause. That the said depositions and all of said direct and cross-inter-

rogatories and all of said answers thereto may be considered by the Court to be in evidence in the above-entitled cause in so far as the same, or any part or portion thereof, may be material to the issues in the cause or relevant thereto. [155]

State of Colorado,
City and County of Denver,—ss.

In the District Court.

No. 49418.

EMMA FORSYTH RUMSEY,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a Corporation,

Defendant.

Interrogatories to be Propounded to George W. Smith, a Witness to be Produced and Sworn on Behalf of the Defendant.

Interrogatory No. 1:

State your full name, age, and present occupation.

Interrogatory No. 2:

If, in answer to Interrogatory No. 1, you state that you are in any way connected with Benson, Smith & Company, Limited, please state what such connection is, and what if any, official connection you now sustain to that Company; how long you have sustained such relation, and the different positions which you have held in connection with said Company, and the

period of time during which you held each such position.

Interrogatory No. 3:

State, if you know, whether Benson, Smith & Company, Limited, is a corporation or a partnership; and if you state it is a corporation, please hand to the Commissioner taking this deposition a certified copy of the charter or Articles of Incorporation of Benson, Smith & Company, Limited, and have the same attached to your deposition as an Exhibit.

Interrogatory No. 4:

Did you know Samuel L. Rumsey in his life time? And if you state that you were acquainted with Samuel L. Rumsey, state the period of time during which you were acquainted with him, and your business relations with him, and the relation which Mr. Samuel L. Rumsey bore to Benson, Smith & Company, Limited, during that time.

Interrogatory No. 5:

Do you know whether or not, about the month of June, A. D. 1903, any application was made to the defendant, New York Life Insurance Company, for a policy of insurance upon the life of Samuel L. Rumsey?

Interrogatory No. 6:

If you answer Interrogatory No 5 in the affirmative, state whether or not a policy of insurance was issued by the defendant, New York Life Insurance Company, during the year 1903 upon the life of said Samuel L. Rumsey.

Interrogatory No. 7:

If you answer the last two preceding interrogatories in the affirmative, state, if you know, to whom the said policy of insurance so issued upon the life of said Samuel L. Rumsey was delivered by the defendant, New York Life Insurance Company; where that policy of insurance now is, and its number, and its principal amount.

Interrogatory No. 8:

If, in answer to the last preceding interrogatory, you state that the said policy of insurance issued by the defendant, New York Life Insurance Company, upon the life [156] of said Samuel L. Rumsey, is now in the possession of said Benson, Smith & Company, Limited, you may state how long it has been in the possession of Benson, Smith & Company, Limited, and whether or not it was ever in the possession of said Samuel L. Rumsey.

Interrogatory No. 9:

If you state, in answer to any of the preceding interrogatories, that a certain policy of insurance was issued by the defendant, New York Life Insurance Company, numbered 3442989, upon the life of said Samuel L. Rumsey, you may state, if you know, who has paid the premiums of insurance upon said policy of insurance so issued by the defendant, New York Life Insurance Company, upon the life of said Samuel L. Rumsey, and the amount of each such payment, and the date when paid, and the person or persons to whom the same were paid.

Interrogatory No. 10:

If you state, in answer to any of the preceding in-

terrogatories, that a policy of insurance was issued upon the life of the said Samuel L. Rumsey by the defendant, New York Life Insurance Company, during the year 1903, you may state, if you know, whether more than one policy of insurance was issued upon the life of the said Samuel L. Rumsey by the defendant, New York Life Insurance Company.

Interrogatory No. 11:

If, in answer to any of the preceding interrogatories, you state that a policy of insurance, in the sum of Five Thousand Dollars ($5,000.00), was issued upon the life of said Samuel L. Rumsey, and that its number was 3442989, and that the said policy of insurance is in the possession of Benson, Smith & Company, Limited, of which you are the President, you will please produce said original policy before the Commissioner taking your deposition, and have a true and correct copy made of said policy of insurance as it now is, attach it to your deposition, and have it certified by the Commissioner as a true and correct copy.

Interrogatory No. 12:

You may state whether or not the copy of the policy of insurance which you have attached to your deposition, in answer to the last preceding interrogatory, is a true and correct copy of the original policy as it now is, and whether or not there is anywhere endorsed upon that original policy any change of the beneficiary originally named therein, to wit, Benson, Smith & Company, Limited; and you may further state whether or not the said original policy of insurance has been in any way changed as to beneficiary,

or in any other way, since its receipt by Benson, Smith & Company, Limited.

Interrogatory No. 13:

If you know, state whether or not Samuel L. Rumsey ever at any time paid any one of the premiums which fell due on said policy of insurance so issued as aforesaid upon the life of the said Samuel L. Rumsey; and if you state that Samuel L. Rumsey did pay any of such premiums, state which ones and when they were paid respectively.

Interrogatory No. 14:

Do you know whether or not, at about the time the policy of insurance was issued by the defendant, New York Life Insurance Company, upon the life of said Samuel L. Rumsey, the defendant issued any other policy or policies of insurance upon the life or lives of any other stockholder or officer of Benson, Smith & Company, Limited; and if you state that you do know, and that such a policy or policies were issued by the defendant, [157] state the numbers of such policies of insurance respectively, the name of the person or persons whose life or lives were respectively insured thereby, and the principal sum of insurance in each such policy; and if such policies are in the possession of Benson, Smith & Company, Limited, present them to the Commissioner taking your deposition, and have a true and accurate copy of such policies, certified by the Commissioner taking your deposition, attached to this your deposition.

Interrogatory No. 15:

If, in answer to the last preceding interrogatory,

you state that a policy of insurance was issued by the defendant, New York Life Insurance Company, upon your own life in the sum of Five Thousand Dollars ($5,000.00), about the month of June, 1903, and also that another policy of insurance was issued by the defendant, New York Life Insurance Company, in the sum of Five Thousand Dollars ($5,000.00), upon the life of A. J. Gignoux, you may state what connection you and the said Gignoux at that time bore to Benson, Smith & Company, Limited, and the conversation, if any, which took place between you and the said Samuel L. Rumsey with reference to procuring the policies of insurance upon your life, the life of the said Gignoux, and the life of the said Samuel L. Rumsey, and the purpose of procuring such policies of insurance and each of them.

Interrogatory No. 16:

State, if you know, whether or not Samuel L. Rumsey was a stockholder in Benson, Smith & Company, Limited, during the year 1903, and also whether you personally and the said A. J. Gignoux were stockholders at that time in said Benson, Smith & Company, Limited.

Interrogatory No. 17.

If, in answer to any of the preceding interrogatories, you state that the defendant, New York Life Insurance Company, did during the year 1903, issue a policy of insurance upon your life in the sum of Five Thousand Dollars ($5,000.00), and also upon the life of the said A. J. Gignoux in the sum of Five Thousand Dollars ($5,000.00) you may state, if

you know, who has paid the premiums of insurance upon said two last mentioned policies of insurance, the amounts of such payments, and to whom paid, and also in whose possession the said two last mentioned policies of insurance have been since their issuance, and in whose possession they now are.

Interrogatory No. 18:

If, in answer to any of the preceding interrogatories, you state that the defendant, New York Life Insurance Company, during the year 1903, issued a policy of insurance, in the sum of Five Thousand Dollars ($5,000.00), upon the life of the said Samuel L. Rumsey, one of like amount upon your life, and one of like amount upon the life of said A. J. Gignoux, you may state, if you know, whether the applications for said three policies were made at about the same time, and for what purpose said policies of insurance were applied for, and whether or not Samuel L. Rumsey knew of that purpose, and if so, how he was aware of that purpose.

Interrogatory No. 19:

You may state, if you know, whether or not the beneficiary named in the policy of insurance issued by the defendant, New York Life Insurance Company, upon your life, and in the policy of insurance upon the life of the said A. J. Gignoux, has ever at any time been changed, and whether either of said two last mentioned policies have endorsed upon them any change [158] of beneficiary.

Interrogtory No. 20:

Who was the agent of the defendant, New York

Life Insurance Company, at Honolulu, in the Territory of Hawaii, to whom application was made for the said policies of insurance upon your life, the life of said Samuel L. Rumsey, and the life of said A. J. Gignoux.

Interrogatory No. 21:

At the time the policies of insurance referred to in the last preceding interrogatory were applied for, did you state to the agent of the defendant, New York Life Insurance Company, the purpose for which said policies of insurance were being applied for, and for whose benefit they were being applied for and if you did, state fully what was said by you at that time to such agent.

Interrogatory No. 22:

State, if you know, what the interests of Samuel L. Rumsey and A. J. Gignoux were respectively in Benson, Smith & Company, Limited, at the time the said policies of insurance upon their lives were applied for.

Interrogatory No. 23:

State the names of all the officers of Benson, Smith & Company, Limited, during the months of June and July, A. D. 1903, and the names of all stockholders of said Company during that time.

Interrogatory No. 24:

State, if you know, whether Benson, Smith & Company, Limited, during the year 1903, required the said Samuel L. Rumsey and the said A. J. Gignoux, or either of them, to take out policies of insurance upon their respective lives for the use and benefit of

Benson, Smith & Company, Limited, and state fully how that requirement was made, and whether or not the said Rumsey and the said Gignoux, or either of them, were requested by Benson, Smith & Company, Limited, to make application for such policies of insurance, and whether or not the purpose of procuring such policies of insurance was explained to the said Rumsey and the said Gignoux respectively, stating in full the conversation which took place relative to those matters.

Interrogatory No. 25:

State, if you know, whether or not Benson, Smith & Company, Limited, has made or now makes any claim to the ownership of the said insurance policy issued upon the life of the said Samuel L. Rumsey by the defendant, New York Life Insurance Company, or the proceeds of such policy; and if you state that Benson, Smith & Company, Limited, does make any such claim, state fully the basis upon which such claim is made by Benson, Smith & Company, Limited.

Interrogatory No. 26:

State, if you know, whether or not Benson, Smith & Company, Limited, has demanded payment from the defendant, New York Life Insurance Company, of the proceeds of said policy of insurance issued by the defendant upon the life of said Samuel L. Rumsey.

Interrogatory No. 27:

State, if you know, whether or not the defendant, New York Life Insurance Company, has requested Benson, Smith & Company, Limited, to intervene and set up its cause of action in the above-entitled suit,

wherein Emma Forsyth Rumsey is plaintiff, and New York Life Insurance Company is defendant, pending [159] in the District Court within and for the City and County of Denver, in the State of Colorado, and if so, whether or not Benson, Smith & Company, Limited, has refused so to intervene.

Interrogatory No. 28:

State where the principal place of business of Benson, Smith & Company, Limited, is, and whether or not that Company has ever at any time transacted any business within the State of Colorado, and whether or not it has ever at any time since the first day of August, A. D. 1910, had any officer, stockholder or agent within the limits of the State of Colorado.

Interrogatory No. 29:

State whether or not all premiums which have become due and payable up to this time upon the policies of insurance issued by the defendant, New York Life Insurance Company, upon your life and the life of the said Gignoux, respectively, have been fu*ly* paid, and if so, by whom paid, and to whom paid.

The foregoing twenty-nine direct interrogatories are to be propounded to George W. Smith, a witness to be produced and sworn on behalf of the defendant in the above-entitled cause, to wit, New York Life Insurance Company.

(S.) CHARLES W. WATERMAN,
Attorney for Defendant, New York Life Insurance Company. [160]

State of Colorado,
City and County of Denver,—ss.

In the District Court.

No. 49418.

EMMA FORSYTH RUMSEY,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE CO., a Corporation,

Defendant.

Cross-interrogatories to be Propounded to the Witness George W. Smith.

Cross-Interrogatory No. 1:

If in answer to a direct interrogatory you have stated that the policy of insurance issued upon the life of Samuel L. Rumsey was delivered by the defendant to Benson, Smith & Company, Limited, state what office, if any, the said Samuel L. Rumsey held in Benson, Smith & Company, Limited, at the time said insurance policy was so delivered.

Cross-Interrogatory No. 2:

If in answer to the last preceding interrogatory, or to any direct interrogatory, you have stated that the said Samuel L. Rumsey was Treasurer of Benson, Smith & Company, Limited, at the time said insurance policy was delivered, state what the duties of the Treasurer of said corporation were.

Cross-Interrogatory No. 3:

If answer to direct interrogatory No. 11 you have stated that the policy of insurance described in said interrogatory is in the possession of Benson, Smith & Company, Limited, of which you are the President, please produce the said original policy before the commissioner taking your deposition, and have it marked for identification by him, and by him attached and returned with your deposition.

Cross-Interrogatory No. 4:

If in answer to direct interrogatory No. 14 you produce before the commissioner taking your deposition other policies of life insurance, which you state were issued by the defendant upon the life or lives of any other stockholder or officer of Benson, Smith & Company, Limited, please deliver such policy or policies to the [161] commissioner taking your deposition, and have the same marked by him for identification, and attached to and returned with your deposition.

Cross-Interrogatory No. 5:

If in answer to any direct or cross-interrogatory you have stated that Samuel L. Rumsey was in the year 1903, or at any time, Treasurer of the corporation of Benson, Smith & Company, Limited, state when said Samuel L. Rumsey became Treasurer of such corporation, how long he continued to be such Treasurer, and when he ceased to be Treasurer of said corporation.

Cross-Interrogatory No. 6:

If in answer to any direct or cross-interrogatory you have stated that Samuel L. Rumsey was at any

time Treasurer of Benson, Smith & Company, Limited, and have stated that he ceased to be such Treasurer, state whether the said Samuel L. Rumsey resigned said office of Treasurer; and if you state that he did not resign such office state by what action of said corporation he, the said Rumsey, ceased to be Treasurer, and who succeeded the said Rumsey as Treasurer of said corporation.

Cross-Interrogatory No. 7:

If you have stated in answer to any direct or cross-interrogatory that Samuel L. Rumsey was at one time Treasurer of said corporation of Benson, Smith & Company, Limited, and that he ceased to be such Treasurer by reason of the fact that at some meeting of the stockholders of said corporation another was elected Treasurer in his stead, state to what, if any, office in said corporation the said Samuel L. Rumsey was elected after or when he ceased to be Treasurer of said corporation and was superseded in his office of Treasurer by some other person.

Cross-Interrogatory No. 8:

If you have already stated that the said Samuel L. Rumsey was at one time Treasurer of said corporation, and that the said Rumsey was succeeded in said office of Treasurer by the election to said office of another person at a meeting of the stockholders of said corporation, and that at some meeting the said Samuel L. Rumsey, was elected Vice-President of said corporation, state whether the said Samuel L. Rumsey was advised or informed before the meeting at which he was so superseded in the office of Treasurer, of the fact that he was to be so superseded, and

if so, by whom? And if you state that the said Rumsey was so advised or informed by letter or other writing, state whether you have a copy of the letter or other writing in your possession, or under your control, or whether such copy of such letter or other writing is in the possession or under the control of said Benson, Smith & Company, Limited. If it is either in your possession, or under your control, or *is the* possession or under the control of the said corporation, produce such copy before the commissioner taking your deposition, have it marked by him for identification and returned by him with your deposition; and if either you, or the said corporation, or any officer thereof received from the said Samuel L. Rumsey an acknowledgment of any notice, advice or information that he was to be superseded in the said office of Treasurer, produce such [162] acknowledgment before the commissioner taking your deposition, have it marked by him for identification, and returned by him with your deposition.

Cross-Interrogatory No. 9:

If you have stated that the said Samuel L. Rumsey resigned his office of Treasurer of said Benson, Smith & Company, Limited, at any time, produce such resignation of him, the said Rumsey, as such officer before the commissioner taking your deposition, have it marked by him for identification and returned with your deposition.

Cross-Interrogatory No. 10:

If you have stated that the said Samuel L. Rumsey was in the year 1903 the Treasurer of said corporation of Benson, Smith & Company, Limited, and have

stated what the duties of him the said Rumsey were as such Treasurer in response to a cross-interrogatory in that behalf heretofore propounded, state what the salary of said office of Treasurer was during the time it was held by him the said Samuel Rumsey, and state how long and during what period of time he the said Samuel L. Rumsey drew such or any salary as Treasurer.

Cross-Interrogatory No. 11:

If you have stated that the said Samuel L. Rumsey was at one time Treasurer of the said corporation of Benson, Smith & Company, Limited, and that as such officer he drew a salary and that at some particular time he the said Rumsey ceased to be such Treasurer, and was superseded by another in said office; state whether that other after the election of him, the said other, to such office of Treasurer, drew the same amount of salary as Treasurer which had theretofore been paid to the said Rumsey, as such officer; and if not, state what salary was paid by said corporation to such other as Treasurer.

Cross-Interrogatory No. 12:

If you have stated that said Samuel L. Rumsey having been Treasurer of said corporation, ceased to be Treasurer thereof at a particular time, and was elected to the office of or did become Vice-President of said corporation, state the duties of the Vice-President of said corporation, state how long the said Samuel L. Rumsey held the said office of Vice-President in said corporation, state what duties the said Samuel L. Rumsey performed as such officer, and state what salary was paid to the said Samuel L.

Rumsey as such Vice-President during the time he held the said office.

Cross-Interrogatory No. 13:

Has the business of the corporation of Benson, Smith & Company, Limited, at any time since the first day of June, 1903, been carried on or conducted at any other place than within the Territory of Hawaii? If so, where? [163]

Cross-Interrogatory No. 14:

When did Samuel L. Rumsey leave the Territory of Hawaii, and where did he go?

Cross-Interrogatory No. 15:

When was the said Samuel L. Rumsey last in the Territory of Hawaii, so far as you know?

Cross-Interrogatory No. 16:

Is it not a fact that the said Samuel L. Rumsey ceased to be actively connected with Benson, Smith & Company, Limited, and the business of said corporation, some time in the year 1903, or early in the year 1904; and that he left the city of Honolulu and the Territory of Hawaii for United States "mainland" in the year 1903, or early in the year 1904,—and if so, give the date when his active connection with the said corporation and its business ceased, and when he so left the city of Honolulu, and said Territory; and state whether he was there after to your knowledge within said Territory; and whether he ever thereafter had any active connection with or performed any duties in the said corporation or rendered any services to the said corporation; and if you say that he did perform any duties, or render any services

to the said corporation after the date he left the said Territory and came to the mainland, state of what such duties and services consisted.

Cross-Interrogatory No. 17:

In what business was the corporation of Benson, Smith & Company, Limited, engaged in the month of June, 1903? In what business has it since been engaged? In what business is it now engaged?

Cross-Interrogatory No. 18:

If in answer to direct interrogatory No. 23, or any other interrogatory, you have stated the names of all stockholders of Benson, Smith & Company, Limited, during the months of June and July 1903, state what changes have occurred in the list of stockholders in said company from the first day of June, 1903, to the time of taking your deposition herein; produce before the commissioner taking your deposition the stock ledger of said corporation containing the list or record of those who have been stockholders in said corporation, the amount of stock held by them respectively at different times from the 1st day of June, 1903, to the time of you taking your deposition herein, and have the said list and record copied for the commissioner and attached to and returned with your deposition.

Cross-Interrogatory No. 19:

Did you retain letter-press, carbon or other copies of your letters written to Samuel L. Rumsey after his departure from the Territory of Hawaii some time in the year 1903 or 1904? [164]

Cross-Interrogatory No. 20:

Have you copy of letter written to Samuel L. Rumsey dated May 29, 1904? If you say you have, produce it before the commissioner taking your deposition, have it marked by him for identification and returned with your deposition.

Cross-Interrogatory No. 21:

If between the 4th day of August, 1904, and the 24th day of January, 1905, you wrote any letters to the said Samuel L. Rumsey in which the subject of a reorganization of the corporation Benson, Smith & Company, Limited, was mentioned, please produce a copy of such letter before the commissioner taking your deposition, have it marked by him for identification and returned with your deposition,—and produce also the reply or replies of the said Rumsey to such letter, and have the same marked for identification by the commissioner and returned with your deposition.

Cross-Interrogatory No. 22:

If you wrote a letter to the said Samuel L. Rumsey on or about January 24, 1905, produce a copy thereof, before the commissioner taking your deposition, have it marked by him for identification and returned with your deposition; also produce the reply, if any, of said Samuel L. Rumsey, and have it marked by the commissioner for identification and returned with your deposition.

Cross-Interrogatory No. 23:

If you wrote a letter to *the* Samuel L. Rumsey on or about the 25th day of June, 1905, and if that letter

was in reply to a letter from Samuel L. Rumsey dated June 11, 1905, please produce before the commissioner a copy of your letter and the letter from Samuel L. Rumsey, and have them marked by him for identification and returned with your deposition.

Cross-Interrogatory No. 24:

Did you receive from Samuel L. Rumsey a letter dated on or about the 19th day of September, 1905? If so, please produce the same before the commissioner taking your deposition, have it marked by him for identification and returned with your deposition; and if you replied to the same on or about October 6, 1905, produce a copy of your letter in reply thereto before the commissioner, have it marked by him for identification and returned with your deposition.

Cross-Interrogatory No. 25:

Did you write a letter to the said Samuel L. Rumsey on or about the 13th day of May, 1906; and if you say you did, please produce a copy of such letter before the commissioner taking your deposition, have it marked by him for identification and returned with your deposition; and produce likewise the reply, if any, from [165] the said Samuel L. Rumsey, and have it marked by the commissioner for identification and returned with your deposition.

Cross-Interrogatory No. 26:

Did you write a letter to the said Samuel L. Rumsey dated on or about the 18th day of June, 1906; and if you say you did, please produce a copy before the commissioner, have it marked by him for identification and returned with your deposition.

Cross-Interrogatory No. 27:

Did you receive a letter from the said Samuel L. Rumsey dated the 25th day of December, 1906? If you say you did, please produce the same before the commissioner, have it marked by him for identification and returned with your deposition. And if you answered the said letter please produce a copy of your answer, have it marked by the commissioner for identification and returned with your deposition.

Cross-Interrogatory No. 28:

Did you receive a letter from the said Samuel L. Rumsey dated the 29th day of March, 1907? If you say you did, please produce the same before the commissioner, have it marked by him for identification and returned with your deposition. If you answer the said letter, also produce a copy of your answer, have it marked by the commissioner for identification and returned with your deposition.

Cross-Interrogatory No. 29:

Did you write a letter to the said Samuel L. Rumsey dated the 8th day of July, 1907? If you say you did, please produce a copy of same before the commissioner, have it marked by him for identification and returned with your deposition.

Cross-Interrogatory No. 30:

Did you receive a letter from the said Samuel L. Rumsey dated the 8th day of August, 1907? If you say you did, please produce the said letter before the commissioner, have it marked by him for identification and returned with your deposition. Did you reply to the same? If you say you did, please pro-

duce a copy of your reply, have it marked by the commissioner for identification and returned with your deposition.

Cross-Interrogatory No. 31:

Did you receive a letter from the said Samuel L. Rumsey dated the 30th day of August, 1907? If you say you did, please produce the same before the commissioner, have it marked by him for identification and returned with your deposition. Did you reply to the same? And if you did produce a copy of such reply, have it marked by the commissioner for identification and returned with your deposition. [166]

Cross-Interrogatory No. 32:

Did you receive a letter from the said Samuel L. Rumsey dated the 16th day of September, 1907? If you say you did, please produce the same before the commissioner, have it marked by him for identification and returned with your deposition; and if you replied to the same, produce a copy of your reply, have it marked by the commissioner for identification and returned with your deposition.

Cross-Interrogatory No. 33:

Did you receive a letter from the said Samuel L. Rumsey dated April 23, 1908; and if you say you did, please produce the same before the commissioner, have it marked by him for identification and returned with your deposition. And if you replied to the same produce a copy of your reply, have it marked by the commissioner for identification and returned with your deposition.

Cross-Interrogatory No. 34:

Did you receive any other letter or letters written by the said Samuel L. Rumsey to you, or the corporation of Benson, Smith & Company, Limited, after June 18, 1906, which relate to or was written concerning, or mentioned the interest of him the said Samuel L. Rumsey as a stockholder in said corporation or the said life insurance policy upon his life, or his salary as an officer of the said corporation; or his connection with the said corporation, and your treatment of him concerning the same? And if you say you did, produce such letter or letters before the commissioner, have them marked by him for identification and returned with your deposition; and produce likewise copy or copies of your reply or replies, and have them marked by the commissioner for identification and returned with your deposition.

Cross-Interrogatory No. 35:

If you have not already done so, please state whether you wrote letters to the said Samuel L. Rumsey under the following dates:

June 25, 1905;
October 6, 1905;
June 8, 1906;
June 18, 1906;
January 22, 1907;
April 11, 1907;
April 18, 1907;
July 8, 1907;
August 22, 1907;
September 25, 1907;
October 6, 1907;
May 16, 1908;

and produce before the commissioner taking your deposition copies of each and all of such letters which you have not already produced, and have them marked by him for identification and returned with your deposition. [167]

Cross-Interrogatory No. 36:

Did the corporation of Benson, Smith & Company, Limited, receive a letter from O'Donnell & Graham, Attorneys of Denver, Colorado, written as attorneys for Emma F. Rumsey, the plaintiff in this case, dated May 7, 1910; and if so did such corporation acknowledge the receipt of said letter? If your answer in the affirmative please produce the said letter of O'Donnell & Graham before the commissioner, have it marked by him for identification and returned with your deposition. Did the said corporation answer said letter under date of June 28, 1910? If you say they did, produce a copy of such reply, and have it marked by the commissioner for identification and returned with your deposition.

Cross-Interrogatory No. 37:

Did the said corporation receive a letter from O'Donnell & Graham, dated July 15, 1910? If you say they did, please produce such letter before the commissioner, have it marked by him for identification and returned with your deposition.

Cross-Interrogatory No. 38:

Did the said corporation receive a letter from the said O'Donnell & Graham dated October 4, 1910? If you say they did, please produce such letter before the commissioner, have it marked by him for identi-

fication and returned with your deposition. Did the said corporation answer said letter under date of November 1, 1910? If so, produce a copy of such reply, have it marked by the commissioner for identification and returned with your deposition.

Cross-Interrogatory No. 39:

Did the said corporation write the letter to the plaintiff herein dated September 20, 1910, attached hereto, signed Benson, Smith & Co., Ltd? By Geo. W. Smith, Pres. & Manager?

Cross-Interrogatory No. 40:

When was the certificate for the fifty shares of stock of Benson, Smith & Company, Limited, which were assigned by Samuel L. Rumsey to Emma F. Rumsey, first presented to said corporation for transfer? And when was the same transferred and a certificate therefor issued to said Emma F. Rumsey?

Cross-Interrogatory No. 41:

What has become of; that is to say, who has purchased from said Emma F. Rumsey the said fifty shares of stock in Benson, Smith & Company, Limited, formerly owned by her?

Cross-Interrogatory No. 42:

If you have answered direct interrogatory No. 26 in the affirmative, state whether said demand was or is in writing. [168]

Cross-interrogatory No. 43:

If in answer to direct interrogatory No. 25 you have stated that Benson, Smith & Company, Limited, has made any demand or claim to the owner-

ship of said insurance policy upon the life of Samuel L. Rumsey, state whether such claim was made in writing.

Cross-interrogatory No. 44:

If in answer to direct interrogatory No. 27 you have stated that the New York Life Insurance Company has requested Benson, Smith & Company, Limited, to intervene in the above-entitled suit, state whether or not such request was in writing; and if you have stated in answer to the same interrogatory that Benson, Smith & Company, Limited, has refused so to intervene, state whether such refusal was or is in writing.

Cross-interrogatory No. 45:

If in answer to any interrogatory you have stated that applications were made to the defendant company during the year 1903, for policies upon the life of Samuel L. Rumsey, your own life, and the life of A. J. Gignoux, state whether such applications or any of them, were in writing; and if some were in writing, and some were not in writing, state which were in writing and which were not in writing.

The foregoing 45 cross-interrogatories are to be propounded to George W. Smith, a witness to be produced and sworn in behalf of the defendant in the above-entitled cause.

_____,

_____,

Attorneys for Plaintiff. [169]

City and County of Honolulu,
Territory of Hawaii,—ss.

Friday, March 24, 1911, 4:15 P. M.

EMMA FORSYTHE RUMSEY,

Plaintiff,

vs.

THE NEW YORK LIFE INSURANCE COMPANY, a Corporation,

Defendant.

Deposition of George W. Smith.

The deposition of George W. Smith, of the City and County of Honolulu, Territory of Hawaii, a witness of lawful age, produced, sworn and examined upon his corporeal oath on the 24th day of March, A. D. 1911, at the office of H. Cushman Carter, Esq., Campbell Block, Merchants Street, in the City and County of Honolulu, Territory of Hawaii aforesaid, by me, H. Cushman Carter, a commissioner duly appointed *dedimus potestatem,* issued out of the clerk's office of the District Court of the City and County of Denver, in the State of Colorado, bearing *teste* in the name of Perry A. Clay, Esq., Clerk of the said District Court and the seal of said court affixed thereto and to me directed as such commissioner for the examination of the said George W. Smith, witness in a certain suit and matter in controversy, now pending and undetermined in the said District Court wherein Emma Forsythe Rumsey is plaintiff and The New York Life Insurance Company, a corporation, is defendant, in behalf of the said defend-

(Deposition of George W. Smith.)

ant, as well as on the cross-interrogatories of the plaintiff, as upon the interrogatories of the defendant, which were attached to or included in the said commission, and upon none others, the said George W. Smith being first duly sworn by me as a witness in the said cause previous to the commencement of his examination, to testify the truth as well on the part of the plaintiff as the defendant in relation to matters in controversy between the said plaintiff and defendant so far as he shall be interrogated, testified and deposed as follows:

(Sworn.)

Answer to Interrogatory 1.

George Waterman Smith; 52 years of age; president and manager of Benson, Smith & Co., Ltd., wholesale and retain druggists.

Answer to Interrogatory 2.

I am president, manager and a majority stockholder of Benson, Smith & Co., Ltd., have been such since the incorporation of the company on January 3, 1898. [170]

Answer to Interrogatory 3.

Benson, Smith & Co., Ltd., is an Hawaiian corporation. A certified copy of the articles of association is submitted herewith.

Answer to Interrogatory 4.

I knew Samuel L. Rumsey from Dec., 1894, until his death. He entered my employ as a clerk in December, 1894, when I was carrying on an individual business, which I incorporated in 1898, when I

(Deposition of George W. Smith.)

placed some stock in his name, to be paid for out of earnings. With my majority vote I had him elected treasurer of the corporation.

Answer to Interrogatory 5.

I know that on or about June, 1903, at my request, and on my insistence Mr. Rumsey applied for insurance on his life to The New York Life Insurance Company of New York, the application being made to the Honolulu office of the company.

Answer to Interrogatory 6.

Such a policy was issued by The New York Life Ins. Co., on the life of Mr. Rumsey.

Answer to Interrogatory 7.

The policy was delivered to Benson-Smith & Co., Ltd. The policy is now in possession of Benson-Smith & Co., Ltd. The number is 3442989 and the amount is for $5,000.

Answer to Interrogatory 8.

The policy has been in possession of Benson-Smith & Co. since its issuance and has never been in possession of Mr. Rumsey.

Answer to Interrogatory 9.

Benson-Smith & Co., Ltd., have always paid the premiums on the policy since its issuance. The premium is $232.30 and payment has been made on the 11th day of June of each and every year during Mr. Rumsey's life. Payments were made at the Honolulu office of the New York Life Insurance Co., to its agent.

(Deposition of George W. Smith.)

Answer to Interrogatory 10.

I know of no other policy being issued on the life of Mr. Rumsey.

Answer to Interrogatory 11.

I now hand to the commissioner a copy of the policy and also the original policy in order that the copy may be compared and verified. [171]

Answer to Interrogatory 12.

The copy offered is a true and correct copy, no endorsement or change of beneficiary has ever been made on the original policy since its receipt by Benson-Smith & Co., Ltd. And it has not been changed or altered in any *way* other way.

Answer to Int. 13.

Mr. Rumsey never paid any of the premiums on the policy.

Answer to Int. 14.

At the time the policy in question was issued to Mr. Rumsey on his life, similar policies in like amounts by the same company were issued on my life. Policy #3442990 for $5,000 and on the life of A. J. Gignoux #3443579 for $5,000. These policies are now in possession of Benson-Smith & Co., Ltd., and I now hand the commissioner true and correct copies thereof and also the originals in order that the copies may be compared and verified.

Answer to Interrogatory 15.

At the time the policies were issued Mr. Gignoux was the secretary of the corporation and I was its president and manager. Before the policies were

(Deposition of George W. Smith.)

taken out the matter was fully discussed between Mr. Rumsey, Mr. Gignoux and myself upon one or more occasions. I do not remember the full details of the conversations but I do know that I said to both of them that it was my desire that such policies should be taken out in favor of Benson-Smith & Co., Ltd., in order that the corporation, which was a close corporation, might be protected in the event of the death of any of its officers. I also stated to them that the purpose of such insurance was to provide the company with funds so that in the event of any such death it could purchase the stock of the deceased and thus prevent the stock going on the open market, having always been a close corporation it was my purpose to maintain it as such in order to prevent outsiders and competitors from acquiring any interest in the Company. Both Mr. Rumsey and Mr. Gignoux in these conversations stated that they agreed that the plan was an excellent one and both assented to the proposal, and they as well as myself accordingly made application for such insurance.

Answer to Int. 16.

Samuel L. Rumsey, A. J. Gignoux and I were all stockholders in the corporation of Benson-Smith & Co., Ltd., in 1903.

Answer to Int. 17.

Benson-Smith & Co., Ltd., have always paid the premiums on the policies issued on the lives of A. J. Gignoux and myself. The amounts being for A. J. Gignoux, $112.80 annually and for myself $190.40

(Deposition of George W. Smith.)

annually. The premiums have been paid at the Honolulu office of the New York Life Insurance Company. Since the issuance of the policies they have been and are now in the possession of Benson-Smith & Co., Ltd. [172]

Answer to Int. 18.

The applications were made at the same time for the purpose set forth in Answer to Interrogatory No. 15. Mr. Rumsey was fully aware of the purpose of the policy on his life and on the lives of Mr. Gignoux and myself and had consented to the issuance of the policy on his life in my presence and in the presence of Mr. Gignoux. Mr. Rumsey learned of the purpose in conversation with Mr. Gignoux and myself, as I have already explained.

Answer to Int. 19.

No change of beneficiary has been made in or on any of the policies and no endorsements have been made on any of them.

Answer to Int. 20.

W. A. Purdy was the agent and solicitor of the company to whom application was made for all of the policies.

Answer to Int. 21.

The agent of the company was fully advised by me of the object of the insurance on the lives of those to be insured. I first having learned from the agent that such policies could be obtained. I cannot recall the details of the conversation but know that the purpose which I have already explained in an-

(Deposition of George W. Smith.)

swer to previous questions was stated by me to Mr. Purdy.

Answer to Int. 22.

At the time the policies were applied for and taken out Mr. Rumsey owned one hundred shares and Mr. Gignoux thirty shares of the capital stock of the corporation out of a total 500 shares.

Answer to Int. 23.

The officers of the corporation in June and July. 1903, were I, George W. Smith, President and Manager, J. H. Fisher, Vice-president, Samuel L. Rumsey, Treasuerr, A. J. Gignoux, Secretary, J. A. Kennedy, auditor. The stockholders were I, George W. Smith, 363 shares, S. L. Rumsey, 100 shares, A. J. Gignoux, 30 shares, J. H. Fisher, 5 shares, James A. Kennedy, 1 share and George F. McLeod, 1 share.

Answer to Int. 24.

Benson, Smith & Co. Ltd., did not formerly require the taking out of such policies but it was mutually agreed by and between myself, Mr. Rumsey and Mr. Gignoux who constituted a majority of the board of directors and who owned all but seven shares of the five hundred shares of the capital stock of the company, that such policies should be taken out in favor of the corporation. As I have already stated I fully explained my desire that such policy of insurance should be taken out in favor of the company stating the purpose and reasons in favor of doing so both to Mr. Rumsey [173] and to Mr. Gignoux. Both Mr. Rumsey and Mr. Gignoux

(Deposition of George W. Smith.)

stated that they approved of the proposal and consented to take out such policies of insurance. I have already stated in my answers to previous questions what the purpose was. Subsequently the taking out of these policies was fully ratified and approved of by all of the other stockholders and directors of the company.

Answer to Int. 25.

Benson, Smith & Co. Ltd., now claim the ownership of the policy on the life of Mr. Rumsey and the proceeds thereof on the ground of being the beneficiary under the policy. That it was taken out for its sole benefit; that the premiums have all been paid by it and that it was taken out for its protection as I have already fully explained.

Answer to Int. 26.

Benson, Smith & Co. Ltd., have made demand for payment of the policy on the New York Life Ins. Co. in writing, and by authorized attorney in person.

Answer to Int. 27.

The New York Life Insurance Co. has requested in writing that Benson, Smith & Co., Ltd., intervene in the case and it has refused to do so.

Answer to Int. 28.

The office and principal place of business of Benson, Smith & Co. Ltd., is in Honolulu, Territory of Hawaii. The corporation has never transacted any business in the State of Colorado, nor has it any stockholder, officer or agent in the State of Colorado, since August 1, 1910.

(Deposition of George W. Smith.)

Answer to Int. 29.

All premiums when due and payable on the policies on the lives of Samuel L. Rumsey, myself and A. J. Gignoux, have been fully paid by Benson, Smith & Co. Ltd., at the Honolulu office of the New York Life Insurance Ltd. to its agent. [174]

Cross-interrogatories Propounded to George W. Smith.

Answer to Cross-int. 1.

At the time such insurance policy was delivered to Benson, Smith & Co. Ltd., by the agent of the company in June, 1903, Mr. Rumsey held the position of treasurer of the company.

Answer to Cross-int. 2.

To take charge of the cash, sign checks, pay salaries and such other duties as usually pertain to the treasurer of a corporation.

Answer to Cross-int. 3.

Benson, Smith & Co. Ltd., declines to permit the original policies to go out of its possession. However, I now produce to the commissioner copies of the said policy and hand to him the original for the purpose of comparison and verification.

Answer to Cross-int. 4.

Benson, Smith & Co. Ltd., declines to permit the original policies called for to go out of its possession. However, I now produce to the commissioner copies of the said policies and hand to him the originals for the purpose of comparison and verification.

Answer to Cross-int. 5.

Mr. Rumsey became treasurer of the corporation

(Deposition of George W. Smith.)

on January 3, 1898, and continued as its treasurer until February, 1905.

Answer to Cross-int. 6.

He did not resign. His term expired with the end of the business year. It was necessary for the proper conduct of the business to elect a successor. He was succeeded by Mr. J. C. McGill.

Answer to Cross-int. 7.

He was elected vice-president of the corporation when Mr. McGill was elected its treasurer.

Answer to Cross-int. 8.

The letter written by Mr. A. J. Gignoux, secretary of the corporation, advising Mr. Rumsey of the change, has been destroyed by fire in common with other papers and letters belonging to the corporation. Mr. Rumsey's acknowledgment of his election dated Sept. 19, 1905, is in my possession and I now tended to the commissioner a copy of his letter for identification herewith. [175]

Answer to Cross-int. 9.

This is not necessary, as the question has been covered in answer to cross-interrogatories 7 and 8.

Answer to Cross-int. 10.

His salary was $250 per month, until his voluntary relinquishment of the salary contained in his letter of October 19, 1904, from Colorado Springs, a copy of which I submit herewith to the commissioner for comparison and verification.

Answer to Cross-int. 11.

That is a matter that concerns the corporation

(Deposition of George W. Smith.)

of Benson, Smith & Co. Ltd., and I must respectfully decline to answer the question.

Answer to Cross-int. 12.

Mr. Rumsey's duties as vice-president were nominal only, no salary was attached to the office. He held the office from Feb., 1905, until Dec. 25, 1906.

When he voluntarily resigned the position in a letter dated from Lexington, Ky., Dec. 25, 1906.

Answer to Cross-int. 13.

It has not been conducted in any other place than in the Territory of Hawaii.

Answer to Cross-int. 14.

He left the Territory of Hawaii in January, 1904, and went to Arizona.

Answer to Cross-int. 15.

January, 1904.

Answer to Cross-int. 16.

Mr. Rumsey's active connection with the corporation of Benson, Smith & Co. Ltd., terminated when he left the Territory of Hawaii on or about the 15th of January, 1904. His indirect connection with the company ceased with the transfer of his stock to Mrs. Emma Forsythe Rumsey. To the best of my knowledge he has not been in the Territory of Hawaii since January, 1904. He rendered no services to the corporation after his departure from the territory.

Answer to Cross-int. 17.

In June, 1903, it was engaged in the wholesale and

(Deposition of George W. Smith.)
retail drug business, has continued to be engaged in that business and is now engaged in that business.

Answer to Cross-int. 18.

I submit herewith a copy of the stock ledger for comparison and verification. [176]

Answer to Cross-int. 19.

I did.

Answer to Cross-int. 20.

I decline to permit any original letters or any original copies of letters written by me to go out of my possession. However, I produce to the commissioner true copies of all the letters referred to and requested, and also hand to the commissioner the original copies for the purpose of comparison and verification. The letters of May 29, 1904, were destroyed by fire in connection with other papers previously referred to.

Answer to Cross-int. 21.

I decline to permit any original letters from Mr. Rumsey or copies of my replies to go out of my possession but I produce to the commissioner the original letters from Mr. Rumsey and copies of all replies for the purpose of comparison and verification.

Answer to Cross-int. 22.

My answer to this interrogatory is the same as to the previous interrogatory. I submit the original letters received and copy of copies of letters written for the purpose of comparison and verification.

(Deposition of George W. Smith.)

Answer to Cross-int. 23.

My answer is the same as to the last interrogatory.

Answer to Cross-int. 24.

I did receive a letter dated Sept. 19, 1905, a copy of which I submit herewith for comparison and verification. I also submit a copy of the copy of a reply dated Oct. 26, 1905.

Answer to Cross-int. 25.

I submit herewith a copy of my letter and a copy of Mr. Rumsey's reply.

Answer to Cross-int. 26.

I submit herewith a copy of a copy of my letter of June 18, 1906.

Answer to Cross-int. 27.

I submit herewith a copy of Mr. Rumsey's letter of Dec. 25, 1906, and a copy of a copy of my reply thereto.

Answer to Cross-int. 28.

I submit herewith a copy of the letter from Mr. Rumsey of the date named and a copy of a copy of my reply thereto.

Answer to Cross-int. 29.

I submit herewith a copy of a copy of my letter dated July 8, 1907. [177]

Answer to Cross-int. 30.

I submit herewith a copy of Mr. Rumsey's letter of the date given and a copy of a copy of my reply.

(Deposition of George W. Smith.)

Answer to Cross-int. 31.

I submit herewith a copy of Mr. Rumsey's letter of Aug. 30, 1908, and a copy of a copy of my reply thereto.

Answer to Cross-int. 32.

I submit herewith a copy of Mr. Rumsey's letter of Sept. 16, 1907, and a copy of a copy of my reply.

Answer to Cross-int. 33.

I submit herewith a copy of Mr. Rumsey's letter of the date referred to and a copy of a copy of my reply.

Answer to Cross-int. 34.

I submit herewith copies of all letters received from Mr. Rumsey and copies of copies of my replies.

Answer to Cross-int. 35.

June 25, 1905, I can find no copy of it. October 6, 1905, I submit herewith a copy of a copy. June 8, 1906, I find no copy. June 18, 1908, I submit herewith copy of a copy. January 22, 1907, I submit herewith a copy of a copy. April 11, 1907, I submit herewith a copy of a copy. April 18, 1907, I find no copy. July 8, 1907, I submit herewith a copy of a copy. September 25, 1907, I submit herewith a copy of a copy. October 6, 1907, I submit herewith a copy of a copy. May 16, 1908, I submit herewith copy of a copy.

Answer to Cross-int. 36.

I submit herewith a copy of the letter from Messrs.

(Deposition of George W. Smith.)

O'Donnell & Graham, dated May 7, 1910. Also a copy of a copy of our letter of June 28, 1910.

Answer to Cross-int. 37.

We did receive such a letter and I submit herewith a copy of the letter.

Answer to Cross-int. 38.

I submit herewith a copy of the letter from O'Donnell & Graham, Dated Oct. 4, 1910, and a copy of a copy of our reply dated Nov. 1st, 1910.

Answer to Cross-int. 39.

Let me see that. The corporation did write the letter and I signed it as president and manager.

Answer to Cross-int. 40.

It was first presented for transfer on April 1st, 1910, and a new certificate was issued on the same date, viz., April 1st, 1910. [178]

Answer to Cross-int. 41.

I, George W. Smith, purchased the fifty shares formerly owned by Mrs. Rumsey.

Answer to Cross-int. 42.

A demand in writing was made on the New York Life Insurance Company for payment of the Rumsey policy.

Answer to Cross-int. 43.

Yes, such claim was made in writing.

Answer to Cross-int. 44.

The request of the New York Life Ins. Co., was in writing and the refusal of Benson, Smith & Co. Ltd., was also in writing.

(Deposition of George W. Smith.)
Answer to Cross-int. 45.

All the applications were in writing.

(Signed) GEORGE WATERMAN SMITH.

[179]

In the District Court.

State of Colorado,
City and County of Denver,—ss.

No. 49418.

EMMA FORSYTH RUMSEY,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a Corporation,

Defendant.

Interrogatories to be Propounded to Alexis J. Gignoux, a Witness to be Produced and Sworn on Behalf of the Defendant.

Interrogatory No. 1.

State your full name, age and present occupation.

Interrogatory No. 2.

State whether or not you were ever in any way, as stockholder or officer, connected with Benson, Smith & Company, Limited, and if so, state the period of time during which you have been a stockholder, and the period of time during which you have held any official position in connection with such Company.

Interrogatory No. 3.

Did you know Samuel L. Rumsey in his life time?

And if you answer in the affirmative, state when you first became acquainted with him, and what your business relations were with him.

Interrogatory No. 4.

Do you know whether or not during the year A. D. 1903, any application was made to the defendant, New York Life Insurance Company, for a policy of insurance upon the life of the said Samuel L. Rumsey; and if you answer in the affirmative, state the name of the agent to whom such application was made, and whether or not any policy of insurance was issued by the defendant pursuant to such application.

Interrogatory No. 5.

Examine the original policy of insurance issued by the defendant, New York Life Insurance Company, upon the life of the said Samuel L. Rumsey, No. 3442989, in the sum of Five Thousand Dollars ($5000.00), presented by Mr. George W. Smith to the Commissioner taking your deposition, and state whether or not that is the policy of insurance issued pursuant to the application referred to in the last preceding interrogatory.

Interrogatory No. 6.

State, if you know, who has paid the premiums upon the policy of insurance referred to in the last preceding interrogatory.

Interrogatory No. 7.

Did you, at about the time of the application for the policy of insurance referred to in the last preceding interrogatory, have a conference with said Samuel L. Rumsey and Mr. George W. Smith rela-

tive to making the application for such policy of insurance? If you answer in the affirmative, state fully the conversation which took place at that time and which took place during the presence of Mr. Rumsey, stating fully what was said by Mr. George W. Smith, by the said Samuel L. Rumsey and yourself relative to procuring insurance from the defendant, [180] New York Life Insurance Company, upon the lives of the said George W. Smith, the said Samuel L. Rumsey and yourself respectively.

Interrogatory No. 8.

Did you see the said policy of insurance issued by defendant, New York Life Insurance Company, upon the life of the said Samuel L. Rumsey, No. 3442989, at or about the time it was delivered in Honolulu by defendant, New York Life Insurance Company? And if you answer in the affirmative, state the name of the agent of New York Life Insurance Company who delivered said policy, and to whom it was delivered, and also state whether or not the said policy of insurance as it now exists has been in any way changed as to beneficiary therein named or otherwise, since the time of such delivery.

Interrogatory No. 9.

State whether or not during the year 1903 application was made to the defendant, New York Life Insurance Company, for a policy of insurance upon your life; and if you answer in the affirmative, state the conditions under which the application therefor was made, and the policy issued, and the purposes of procuring such insurance, and also state who has

possession of such policy, and who has paid all the premiums thereon, and further state whether or not you personally claim any interest in such policy or the proceeds thereof.

Interrogatory No. 10.

Examine the original policy of insurance issued by defendants, New York Life Insurance Company, upon the life of A. J. Gignoux, in the sum of Five Thousand Dollars ($5000.00), presented to the Commissioner taking your deposition by Mr. George W. Smith, and state whether or not that is the policy of insurance to which you refer in your answer to the last preceding interrogatory, and if you state that it is, state whether or not the instrument attached to the deposition of Mr. George W. Smith taken before the Commissioner taking your deposition, and purporting to be a copy thereof, is a true and actual copy thereof, and state further whether or not the beneficiary originally named therein has ever been changed, by endorsement upon said original policy.
Interrogatory No. 11.

State, if you know, in whose possession the said policy of insurance issued upon the life of the said Samuel L. Rumsey now is, and whether it was ever at any time in the possession of the said Samuel L. Rumsey.

The foregoing eleven direct interrogatories are to be propounded to Alexis J. Gignoux, a witness to be produced and sworn on behalf of the defendant in the

above-entitled cause, to wit, New York Life Insurance Company.

(S.) CHARLES W. WATERMAN,
Attorney for Defendant, New York Life Insurance Company. [181]

City and County of Honolulu,
Territory of Hawaii,—ss.

Friday, March 24th, 1911, 7:30 P. M.

EMMA FORSYTHE RUMSEY,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a Corporation,

Defendant.

Deposition of Alexis John Gignoux.

Answer to Interrogatory 1.

Alexis John Gignoux; age, 34 years. My present occupation is Vice-president of Benson, Smith & Co. Ltd.

Answer to Interrogatory 2.

Yes, I am connected with Benson, Smith & Co. Ltd. both as a stockholder and officer. I have been a stockholder in Benson, Smith & Co. Ltd. since Sept. 2, 1902. I have been an officer of Benson, Smith & Co. Ltd. since January 26, 1903.

Answer to Interrogatory 3.

Yes, I knew Samuel L. Rumsey in his life time. I first became acquainted with him in St. Louis in 1900. My business relations with him were those of a stockholder and officer in Benson, Smith & Co. Ltd.

(Deposition of Alexis John Gignoux.)

Answer to Interrogatory 4.

Yes, I knew that such an application was made during the year 1903. Major W. A. Purdy of Honolulu was the agent. The policy was issued.

Answer to Interrogatory 5.

I have examined the policy mentioned as directed and it is the same policy issued to Mr. Rumsey pursuant to the application referred to.

Answer to Interrogatory 6.

Benson, Smith & Co. Ltd. have paid all of the premiums upon the policy referred to.

Answer to Interrogatory 7.

Yes, there was such a conference between Mr. Smith, Mr. Rumsey and myself. I do not rememebr the exact conversation as it was so long ago, but I do remember that at that time Mr. Smith stated that [182] he desired that we should have our lives insured in favor of Benson, Smith & Co. Ltd. and that Benson, Smith & Co. Ltd. would pay all of the premiums. He stated that his reasons for wishing us to do so were in order to protect Benson, Smith & Co. Ltd. in case of the death of any of us so that the firm would be in positon to purchase the stock of each of us so dying, thereby carrying out the policy of the company to remain a close corporation, and thus preventing outsiders and competitors from becoming stockholders in the company. Both Mr. Rumsey and myself expressed our approval and consented to have our lives insured, in accordance with the plan set forth by Mr. Smith. All of his conversation took place in the presence of Mr. Rumsey.

(Deposition of Alexis John Gignoux.)

Answer to Interrogatory 8.

Yes, I saw the said policy at the time mentioned. Major W. A. Purdy of Honolulu was the agent. The policy was delivered to Benson, Smith & Co., Ltd. and I believe handed to Mr. George W. Smith, our president and manager. The said policy of insurance has in no way been changed as to the beneficiary therein named or otherwise.

Answer to Interrogatory 9.

Yes, such application was made. The conditions were the same as with regard to Mr. Rumsey's policy; that is that the policy was made payable to Benson Smith & Co. Ltd. and that Benson Smith & Co. Ltd. were to pay all of the premiums thereon. The purpose of procuring such insurance was to protect Benson Smith & Co. Ltd. in case of my death, so that they would be able to purchase my stock thereby keeping the same out of the hands of competitors or some undesirable person. Benson Smith & Co. Ltd. have at present time and always have had possession of the policy and Benson Smith & Co. Ltd. have paid all premiums on the same. I do not claim any interest in the said policy or the proceeds thereof.

Answer to Interrogatory 10.

I have examined the policy mentioned as directed and it is the policy referred to by me in the answer to the last question. Yes, it is a true and actual copy thereof. The beneficiary named therein has never been changed by endorsement upon the policy or otherwise.

(Deposition of Alexis John Gignoux.)
Answer to Interrogatory 11.

The said policy is now and always has been in the possession of Benson Smith & Co. Ltd. Said policy was never in the possession of Samuel L. Rumsey.

(Signed) ALEXIS J. GIGNOUX. [183]

State of Colorado,
City and County of Denver,—ss.

In the District Court.

No. 49418.

EMMA FORSYTH RUMSEY,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a Corporation,

Defendant.

Interrogatories to be Propounded to W. A. Purdy, a Witness to be Produced and Sworn on Behalf of the Defendant.

Interrogatory No. 1:

State your full name, age, and present occupation.

Interrogatory No. 2:

If you state, in answer to interrogatory No. 1, that you are an agent of defendant, New York Life Insurance Company, state how long you have been such agent at Honolulu in the Territory of Hawaii, and state fully the character and duties of your agency.

Interrogatory No. 3:

Did you know Mr. Samuel L. Rumsey in his life-

time, and if so, when did you first become acquainted with him?

Interrogatory No. 4:

Do you know Mr. George W. Smith, President of Benson, Smith & Company, Limited, and Mr. A. J. Gignoux, Vice-President of that company? And if you answer in the affirmative, state how long you have known each of them respectively.

Interrogatory No. 5:

What was the business of Mr. Samuel L. Rumsey, if you know, during the year 1903?

Interrogatory No. 6:

Do you know whether or not any application for insurance upon the life of the said Mr. Samuel L. Rumsey was made to defendant, New York Life Insurance Company, during the year 1903? If you answer affirmatively, state whether or not a policy of insurance was issued pursuant to that application upon the life of said Rumsey, and state its number, amount and date.

Interrogatory No. 7:

Examine the original policy of insurance issued by defendant, New York Life Insurance Company, upon the life of said Samuel L. Rumsey, presented to the Commissioner taking your deposition by George W. Smith, President of Benson, Smith & Company, Limited, copy of which is attached to the deposition of said Smith, and state whether that is the policy of insurance to which you referred in your answer to the last preceding interrogatory.

Interrogatory No. 8:

Do you know who delivered the original policy of insurance referred to in the answer to the last preceding interrogatory, on behalf of the defendant, New York Life Insurance Company, and if so, state the names of the person who did deliver it, and if you state that you delivered it personally, state to whom it was delivered, and whether or not at the same time any other policy of insurance was delivered by you which had been issued by defendant, New York Life Insurance Company, and to [184] whom such policies were delivered, describing such policies fully.

Interrogatory No. 9:

Examine again the original policy of insurance referred to in the preceding interrogatory, No. 7, and state whether or not any change in the beneficiary originally named in said policy at the time when you delivered it, as stated by you in answer to the preceding interrogatory, No. 8, has ever been made by any endorsement upon said policy issued by the defendant, New York Life Insurance Company, upon the life of the said Samuel L. Rumsey.

Interrogatory No. 10:

State, if you know, whether or not an application or applications were made to the defendant, New York Life Insurance Company, for insurance upon the lifes of said George W. Smith and A. J. Gignoux, respectively, at or about the same time the application was made for insurance upon the life of said Samuel L. Rumsey; and if you answer in the affirmative, state whether such applications

were made to you personally as agent for the defendant, New York Life Insurance Company.

Interrogatory No. 11:

If, in answer to any of the preceding interrogatories, you state that applications were made for insurance upon the lives of the said Rumsey, that said George W. Smith and the said A. J. Gignoux to you as the agent of defendant, New York Life Insurance Company, state who were present at the time of the making of such applications, and what was said by you and the persons respectively present at such time.

Interrogatory No. 12:

State, of you know, whether or not the defendant, New York Life Insurance Company, issued policies of insurance upon the lives of the said George W. Smith and A. J. Gignoux, respectively.

Interrogatory No. 13:

If, in answer to the last preceding interrogatory, you state that the defendant, New York Life Insurance Company, did issue policies of insurance upon the lives of the said George W. Smith and A. J. Gignoux, respectively, state, if you know, who delivered such policies on behalf of defendant, New York Life Insurance Company, and to whom the same were delivered.

Interrogatory No. 14:

If, in answer to the last preceding interrogatory, you state that you personally delivered the policies of insurance referred to in that interrogatory, please examine the two original policies of insurance presented to the Commissioner taking your deposition

by the said George W. Smith, which were issued upon the lives of the said George W. Smith and said A. J. Gignoux, respectively, and state whether those original policies are the ones which you delivered, and further state whether true and correct copies thereof are attached by the Commissioner to the deposition of the said George W. Smith taken in the above-entitled case.

Interrogatory No. 15:

Examine the two original policies of insurance referred to in the last preceding question in their present condition, and state whether any change in the beneficiary originally named in said policies and each of them, at the time when you delivered them, has ever been made by any endorsement upon such policies, or either of them.

Interrogatory No. 16:

Do you know who paid the first or initial payment upon the said policy of insurance issued upon the life of [185] the said Samuel L. Rumsey? If you answer affirmatively, state who paid it, the amount of it, and to whom it was paid and when it was paid.

Interrogatory No. 17:

If, in answer to any of the preceding interrogatories, you state that you personally delivered policies of insurance issued by the defendant, New York Life Insurance Company, upon the lives of the said George W. Smith and A. J. Gignoux, respectively, state to whom you delivered the same, when they were delivered, and what other policy or policies of insurance were delivered at the same time.

Interrogatory No. 18:

Do you know who paid the first or initial premium upon the policies of insurance issued by the defendant, New York Life Insurance Company, upon the lives of said George W. Smith and said A. J. Gignoux, respectively, and if you answer affirmatively state who did make payment of such initial premiums upon each of said policies mentioned in this interrogatory the amount of them, respectively, the date when paid, and to whom paid, and whether or not at the same time the premium upon any other policy of insurance issued by the defendant was paid and if so, upon what policy.

Interrogatory No. 19:

Do you know who paid the annual premiums upon the said policy of insurance issued by defendant, New York Life Insurance Company, upon the life of the said Samuel L. Rumsey subsequent to the first or initial payment, and if you answer affirmatively, state who paid each such annual premium, the time when each such annual premium was paid, and where it was paid.

Interrogatory No. 20:

Do you know who paid the annual premium upon the said policy of insurance issued by the defendant, New York Life Insurance Company, upon the life of the said Samuel L. Rumsey, which fell due during the year A. D. 1910? If you answer affirmatively, state who made the payment of such premium, the date on which it was made, and where it was made.

Interrogatory No. 21:

Did you ever at any time have any conversation with the said Samuel L. Rumsey with reference to the said policy of insurance issued upon his life by defendant, New York Life Insurance Company? If you did, state fully what was said by the said Samuel L. Rumsey, and what was said by you, relative to that matter.

Interrogatory No. 22:

Do you know who now has the actual possession of the said policy of insurance issued upon the life of the said Samuel L. Rumsey by defendant, New York Life Insurance Company? If you answer in the affirmative, state who is in the actual possession of said policy.

Interrogatory No. 23:

Has any claim or demand for the proceeds of the said policy of insurance issued by defendant, New York Life Insurance Company, upon the life of said Samuel L. Rumsey, or demand for the payment thereof, ever been made upon defendant, New York Life Insurance Company, or upon you as agent of that company, by said Benson, Smith & Company, Limited? If you answer in the affirmative, state when such demand or demands were made, and where they were made and give the name of the person making the demand. [186]

Interrogatory No. 24:

If you state, in answer to any of the preceding interrogatories, that the initial premium upon the said policy of insurance issued by the defendant, New

York Life Insurance Company, upon the life of the said Samuel L. Rumsey, and all subsequent premiums thereon which have annually become due and payable, have been paid by said Benson, Smith & Company, Limited, state in detail the exact amount paid in each year as premiums upon said policy issued upon the life of the said Rumsey, the date of each such payment by whom personally paid and where paid.

The foregoing twenty-four direct interrogatories are to be propounded to W. A. Purdy, a witness to be produced and sworn on behalf of the defendant in the above-entitled cause, to wit, New York Life Insurance Company.

(Signed) CHARLES W. WATERMAN,
Attorney for Defendant, New York Life Insurance Company. [187]

Cross-Interrogatories to be Propounded to the Witness W. A. PURDY.

Cross-Interrogatory No. 1:

If you have stated in answer to direct interrogatory No. 8, or any other interrogatory, that you delivered the policy of insurance upon the life of Samuel L. Rumsey, to any person, state when it was delivered, whether you took a receipt therefor; and if you did take a receipt produce it before the commissioner taking your deposition, have it marked by him for identification and attached to your deposition. State particularly the place where the said policy was delivered; and if it was delivered at any office or business establishment state at whose office or establishment, and who was present at the time.

Cross-Interrogatory No. 2:

If in answer to direct interrogatory No. 23, or any other interrogatory, you have stated that a claim or demand for the proceeds of said policy of insurance on the life of Samuel L. Rumsey has been made upon the defendant, or upon you as agent of defendant, by Benson, Smith & Company, Limited, state whether or not such claim or demand was in writing.

Cross-Interrogatory No. 3:

If in answer to direct interrogatory No. 6, or any other interrogatory, you have stated that an application for insurance upon the life of Samuel L. Rumsey was made to defendant in the year 1903, state whether or not such claim or demand was in writing.

Cross-Interrogatory No. 4:

State whether you are not on very intimate and friendly terms with George W. Smith, President and Manager of Benson, Smith & Company, Limited.

Cross-Interrogatory No. 5:

Is it your wish that Benson, Smith & Company, Limited, should receive the proceeds of the said insurance policy upon the life of Samuel L. Rumsey?

Cross-Interrogatory No. 6:

When did you first learn that the said Samuel L. Rumsey, and the said Benson, Smith & Company, Limited, were in dispute or at variance or disagreement as to their respective rights in or to the said policy of insurance upon the life of said Samuel L. Rumsey?

Cross-Interrogatory No. 7:

Were you not advised by your principal, the New

York Life Insurance Company, some time in the year 1907, or thereafter, that the said Samuel L. Rumsey had substituted, or attempted to substitute his wife Emma F. Rumsey, the plaintiff in this action, as beneficiary in said policy upon the life of him the said Samuel L. Rumsey? And if you were, produce before the Commissioner the correspondence between you as agent of the defendant company, and the defendant company or any officer thereof, with respect to the matters in this interrogatory mentioned, have the same [188] marked by the Commissioner for identification and returned with your deposition.

Cross-Interrogatory No. 8:

Please produce before the Commissioner taking your deposition, all correspondence between you as agent of the said defendant company, and the said company, concerning the said policy upon the life of said Samuel L. Rumsey, between the 1st day of June, 1907, and the time of taking your deposition herein, have the same marked by the commissioner for identification and returned with your deposition.

Cross-Interrogatory No. 9:

When did you first communicate to Benson, Smith & Company, or any officer thereof, and to what officer thereof, any information respecting any claim or claims made by Samuel L. Rumsey, or Emma F. Rumsey, with respect to the policy of insurance upon the life of Samuel F. Rumsey described in the direct interrogatories?

Cross-Interrogatory No. 10:

State fully each and every conversation you have had with George W. Smith, A. J. Gignoux, W. C. McGonagle, J. C. McGill, or any other officer of Benson, Smith & Company, Limited, on the subject of the insurance policy on the life of Samuel L. Rumsey described in the direct interrogatories, and what was said upon this subject by each person with whom you have had any such conversation. State when and where such conversations occurred, and who was present at said respective conversations.

Cross-Interrogatory No. 11:

Did you have any conversation with George W. Smith, A. G. Gignoux, or any other officer of Benson, Smith & Company, Limited, or any attorney representing Benson, Smith & Company, Limited, concerning the taking of the deposition of said George W. Smith, A. J. Gignoux, or yourself? If so, state fully each such conversation.

Cross-Interrogatory No. 12:

Did you write any letters, or send any telegrams or cablegrams, to any officer of the defendant company, or any attorney for the defendant company, concerning the taking of the deposition of yourself, George W. Smith or A. J. Gignoux? If so, state with whom you had such correspondence and produce before the commissioner any letter or letters, or telegram received by you from any officer, agent or attorney of the defendant company, and a copy of any letter, or letters or telegram or cablegrams, sent by you to any such officer, agent or attorney on the sub-

ject of taking of said or any depositions in this case; have the same marked for identification by the commissioner and returned with your deposition.

Cross-Interrogatory No. 13.

State whether you have heard the testimony of the witnesses George W. Smith and A. J. Gignoux, in answer to the interrogatories propounded to them, and to be taken under the same commission under which your deposition is being taken. Or whether the testimony of such witnesses or either of them has been read to you. [189]

Cross-interrogatory No. 14:

State who, besides yourself and the commissioner, taking your deposition, have been present during the taking of your deposition, or any portion thereof?

Cross-interrogatory No. 15:

State whether any copy of the interrogatories or cross-interrogatories propounded to you, or to the said witnesses George W. Smith and A. J. Gignoux, was furnished to you prior to the taking of your deposition; and if so, by whom furnished? And state whether you read the interrogatories propounded to you, or any of them, or the interrogatories propounded to the said Smith or the said Gignoux, or either of them, before giving your deposition?

Cross-interrogatory No. 16:

If you have stated that you had a copy of any interrogatories propounded to yourself, or to the witnesses Smith or Gignoux, state whether you furnished or gave to the said Smith or said Gignoux any

copy or copies of such or any such interrogatories, or furnished or permitted either of said witnesses to have access thereto.

Cross-interrogatory No. 17:

State whether you have conferred with the said George W. Smith or A. J. Gignoux, or either of them, with respect to your testimony to be given in answer to the interrogatories in this case, or with respect to their answers to the interrogatories propounded to them, or to be propounded to them, or with respect to the facts testified to by you, or testified to or to be testified to by them, or either of them, in answer to the interrogatories to them respectively propounded or to be propounded?

Cross-interrogatory No. 18:

State, if you know, who furnished Charles W. Waterman, Esquire, attorney for defendant in this case, the name of the commissioner taking this deposition?

The foregoing 18 cross-interrogatories are to be propounded to the witness W. A. Purdy, a witness to be produced and sworn in behalf of the defendant in the above-entitled cause.

_____,

_____,

Attorney for Plaintiff. [190]

Deposition of William Amon Purdy.

Answer to Interrogatory 1.

William Amon Purdy; age, 44; occupation, agent New York Life Insurance Company.

(Deposition of William Amon Purdy.)

Answer to Interrogatory 2.

October 1, 1902, soliciting new business, keeping in touch with the company's policy-holders, watching over the payment of renewal premiums and generally overlooking the company's affairs and policy-holders' interests.

Answer to Interrogatory 3.

Yes, in October or November, 1898.

Answer to Interrogatory 4.

Yes, Mr. Smith in the fall of 1898 and Mr. Gignoux, in the winter of 1902 and 1903.

Answer to Interrogatory 5.

He was treasurer of Benson, Smith & Co., Ltd.

Answer to Interrogatory 6.

Yes, application was made. Yes, a policy was issued, as of June 11, 1903. Policy No. 3442989 for $5,000.

Answer to Interrogatory 7.

Yes, this is the policy that I delivered to Benson, Smith & Co.

Answer to Interrogatory 8.

Yes, I delivered the policy referred to Mr. George W. Smith together with two other policies for $5,000 each, both dated June 1, 1903, No. 3442990 being on the life of George W. Smith and No. 3443579 being on the life of Alexander J. Gignoux.

Answer to Interrogatory 9.

No, no change of beneficiary has ever been recorded.

(Deposition of William Amon Purdy.)

Answer to Interrogatory 10.

Yes, applications were made for insurance upon the lives of George W. Smith, A. J. Gignoux and Samuel L. Rumsey to me as agent of the New York Life Insurance Co., at the same time on June 11, 1903.

Answer to Interrogatory 11.

There were present Messrs. Smith, Rumsey and Gignoux in the office compartment of Benson, Smith & Co., in Honolulu. I asked Mr. Smith if he had come to a favorable decision in the matter of taking insurance on the lives of the active members of the corporation for the benefit of the corporation in the event of its loss by the death of any one of the active members. He said [191] "Yes, go ahead $5,000 each." I sat at his desk and completed the three applications, making Benson, Smith & Co., the beneficiary in each application. Each applicant signed his application and I allowed Mr. Smith to pick out a physician naming over five different examiners to make the examinations, saying if for business reasons it was any advantage to him he could have his choice of examiners.

Answer to Interrogatory 12.

Yes, he did. Yes, the company did.

Answer to Interrogatory 13.

I delivered them to Mr. George W. Smith.

Answer to Interrogatory 14.

Yes, these are the original policies and these are true and correct copies of the originals respectively.

(Deposition of William Amon Purdy.)

Answer to Interrogatory 15.

No, no change has been made in the beneficiary.

Answer to Interrogatory 16.

Yes, Benson, Smith & Co. paid the premium $232.30 to me on the 22d day of July, 1903.

Answer to Interrogatory 17.

On July 22d, 1903, I delivered to Mr. George W. Smith a policy on the life of Samuel L. Rumsey, together with the policies on the lives of George W. Smith and A. J. Gignoux.

Answer to Interrogatory 18.

Yes, I know who paid the first premium on the policies on the lives of George W. Smith and A. J. Gignoux. Benson, Smith & Co. paid those premiums. The amount of that upon Smith's life being $190.40 and upon Gignoux's life $112.80. They were paid on the 22d day of July, 1903, to me as agent of the New York Life Insurance and at the same time the premium was paid by Benson, Smith & Co. upon Policy No. 3442989 upon Rumsey's life.

Answer to Interrogatory 19.

Yes, I know that the annual premiums upon the policy issued upon the life of Samuel L. Rumsey subsequent to the first payment were all paid by Benson, Smith & Co. herein Honolulu at the office of the New York Life Insurance. The payment of 1904 was made on the 10th day of June, 1905, on the 11th day of June; 1906 on the 11th day of July; 1907 on the 10th day of July; 1908 on the 11th day of July;

(Deposition of William Amon Purdy.)

1909 on the 10th day of July; 1910 on the 9th day of June.

Answer to Interrogatory 20.

Yes, I know who paid the 1910 premium. The payment was made by Benson, Smith & Co. on June 9, 1910, at the New York Life Insurance [192] Company's office in Honolulu, Room 202 Judd Building.

Answer to Interrogatory 21.

Yes, after Mr. Rumsey had been examined for the corporation insurance in favor of Benson, Smith & Co. I suggested that he had passed a good examination and had better take out a policy on his own account. He said no, that he was a bachelor never expected to marry and called my attention to the longevity of his family as evidenced in the medical examination and said that he did not care to do any life insurance business on his own account.

Answer to Interrogatory 22.

Yes, the policy is and always has been in the possession of Benson, Smith & Co., Ltd., of Honolulu.

Answer to Interrogatory 23.

Yes, demand has been made upon the New York Life Insurance Company by Benson, Smith & Co., Ltd., the beneficiaries under policy #3442989. The demand was made at the New York Life Insurance Company's office in Honolulu by Benson, Smith & Co., Ltd., by its treasurer J. C. McGill on the 29th day of August, 1910.

(Deposition of William Amon Purdy.)

Answer to Interrogatory 24.

Yes, the first and all subsequent premiums as they became due have been paid by Benson, Smith & Co., Ltd. The exact amount paid in each year's premiums upon the life of Mr. Rumsey and the date of payment are as follows:

1903, $232.30; on the 22d of July, 1904, $232.30; on the 10th of June, 1905, $232.30; on the 11th day of June, 1906, $232.30; and 95 cents grace interest; on the 11th day of July, 1907, $232.30 and grace interest 95 cents; on the 10th day of July, 1908, $232.30 and grace interest 96 cents; on the 11th day of July, 1909, $232.30; on the 10th day of July, 1910, $232.30 on the 9th day of June. [193]

Cross-interrogatories Propounded to WILLIAM A. PURDY.

Answer to Cross-int. 1.

I delivered the policy on the life of Samuel Rumsey on July 22, 1903. I delivered the policy of insurance on the life of Samuel L. Rumsey to Benson, Smith & Co., Ltd., of Honolulu at their office. I handed the policy to Mr. Smith and I remember that Mr. Rumsey was present at the time. I took no receipt from Benson, Smith & Co., Ltd., as no receipt was required.

Answer to Cross-int. 2.

Yes, claim in writing has been made by Benson, Smith & Co., Ltd.

Answer to Cross-int. 3.

Yes, the application was in writing.

(Deposition of William Amon Purdy.)

Answer to Cross-int. 4.

No, quite the contrary.

Answer to Cross-int. 5.

I sold Benson, Smith & Co., Ltd., for a specific purpose and certainly I want to see them paid the $5,000.

Answer to Cross-int. 6.

Someone from Benson, Smith & Co., Ltd., I cannot say who, informed our office that the New York Life Insurance Company had notified them from New York that a claim had been made by a Mrs. Rumsey for the proceeds of this policy. It was probably a month after Benson, Smith & Co., Ltd., filed their claim here.

Answer to Cross-interrogatory 7.

No, never heard of it.

Answer to Cross-interrogatory 8.

I had no correspondence whatever with the Home Office of the Co.

Answer to Cross-int. 9.

I have given Benson, Smith & Co., Ltd., no information whatever.

Answer to Cross-int. 10.

I have talked briefly with Mr. Smith but I cannot remember that we have gone into any matters of detail which have not been fully explained in the answers already given in this deposition.

Answer to Cross-int. 11.

I had a conversation on the street with Judge Stanley who told me that depositions would be taken

(Deposition of William Amon Purdy.)

and that Mr. Smith had [194] letters relative to it. I saw Mr. Smith at his office and obtained from him a copy of the questions to be asked me, which I returned him the next day after reading them over. I had no conversation with Mr. Smith. I met Mr. Gignoux and Judge Stanley on the street and told them that if they did not hurry with the taking of the depositions I would be gone on a vacation.

Answer to Cross-int. 12.

I wrote no letters and sent no telegrams or cables and have no letters or cables from anyone in regard to this matter except a mere notification from a Mr. Waterman who said that he represented the New York Life Ins. Co. in Denver, and that I would be called upon to make a deposition. My notification from Mr. Waterman was filed in the waste basket. I did not deem it official and otherwise have had no communication from anyone connected with the management of the New York Life Ins. Co.

Answer to Cross-int. 13.

No.

Answer to Cross-int. 14.

No one except the stenographer, Mr. R. A. Kearns.

Answer to Cross-int. 15.

When notified by Mr. Waterman I asked Mr. Smith if he knew anything about the taking of depositions and he handed me a list of questions to be asked me. I read my own questions and returned them to him the next day. I never saw the questions

(Deposition of William Amon Purdy.)

to be asked of Mr. Smith or Mr. Gignoux, and had no conversation with them in regard to their questions.

Answer to Cross-int. 16.

No, I had no questions and saw none, except the one which I obtained from Mr. Smith relative to my own testimony.

Answer to Cross-int. 17.

No, I have had no conversation with them and they have had no conversation with me.

Answer to Cross-int. 18.

I never heard of Mr. Waterman until I received his notification and I have not the slightest idea who recommended the commissioner, Mr. H. Cushman Carter.

(Signed) WILLIAM AMON PURDY. [195]

VI.

That no change of beneficiary was ever at any time endorsed upon the policy so issued upon the life of the said Samuel L. Rumsey. That on the 13th day of July, 1907, the said respondent, New York Life Insurance Company, received at its Home Office in the City of New York a request from the said Samuel L. Rumsey to change the beneficiary of said policy of insurance from "Benson, Smith & Co.," to Emma Forsyth Rumsey, said request being in the following form:

"July 9th, 1907.

New York Life Insurance Company,
346–348 Broadway, New York.

The beneficiary under policy No. 3,442,989, in ac-

cordance with the change of beneficiary clause thereof, is hereby changed from Benson, Smith & Co., to Emma Forsyth Rumsey.

The policy is not now assigned.

S. L. RUMSEY,
Insured.

JOHN W. GRAHAM, JR.,
Witness."

That the said policy of insurance did not accompany the said request and was never forwarded to said respondent, New York Life Insurance Company, and for that reason the change of beneficiary referred to in said communication dated July 9th, 1907, was never endorsed on said policy. That the reason why said policy of insurance was never forwarded to said respondent, New York Life Insurance Company, to have endorsed thereon a change of beneficiary was because at all times the said respondent, Benson, Smith & Company, Limited, held possession of said policy of insurance under a claim that it was entitled to the possession of the same and to the proceeds thereof in the event of the death of the said Samuel L. Rumsey and because the said Benson, Smith & Company, Limited, refused at all times to waive any of its rights and claimed rights asserted by it upon and to the said policy and its proceeds, and because of the refusal of the said respondent, Benson, Smith & Company, Limited, to deliver up said policy to the insured, for the reasons above stated. [196]

That the following are true and correct copies of letters, etc., duly forwarded and received by the re-

spective senders, addresses and recipients as by said letters, etc., indicated bearing upon and relating to the said matter of change of beneficiary and bearing upon and relating to the matters in controversy in the above-entitled cause. That all of said letters, etc., may be considered by the Court to be in evidence in the above-entitled cause in so far as the same, or any part or portion thereof, may be material to the issues in the cause or relevant thereto. [197]

Law Offices,
T. J. O'Donnell,
822–823 Ernest & Cranmer Building,
Denver, Colorado.

June 8th, 1907.

New York Life Insurance Co.,
New York Life Bldg.,
New York City, N. Y.

Gentlemen:

Some four years ago, Mr. Samuel Rumsey of Honolulu, treasurer of Benson-Smith & Company, a corporation incorporated under the laws of *Hiwiaii,* took out a policy in your Company for $5,000, payable to the Company. Mr. Rumsey has severed his connection with the corporation Benson-Smith & Company, sold his interest therein and removed to this State, and has a preliminary to making some change in the policy and desires to obtain a copy thereof.

Will you kindly have copy made and forward to me or to Mr. Rumsey in my care? Your agent here, or Judge Hiram Steele, of your Board of Directors,

will undoubtedly advise you that you may give full credit to our statement that we are attorneys for Mr. Rumsey.

Thanking you in advance for an early reply, we beg to remain,

Very truly yours,
(S.) T. J. O'DONNELL. [198]

New York, June 14, 1907.

Mr. T. J. O'Donnell,
822–826 Ernest & Cranmer Bldg.,
Denver, Colo.
Re Pol. No. 3,442,989—Rumsey.

Dear Sir:

We have your favor of the 8th inst. requesting copy of the above policy, and in reply thereto we beg to inform you that under the company's rules, we cannot issue a copy of this policy while the original policy is in existence. However, upon written notice from the insured, we shall be pleased to give you any information you desire in regard to the policy.

Yours truly,
JOHN C. McCALL,
Secretary.
Per. E. F. LAWES,
L. Supt. [199]

June 17th, 1907.

New York Life Insurance Co.,
New York Life Bldg.,
New York City, N. Y.

Gentlemen:

My attorney, Mr. T. J. O'Donnell, has submitted to

me your letter of June 14th, in reply to his of the 8th, in re policy 3,442,989, issued on my life.

I beg hereby to request that you "furnish Mr. O'Donnell such information as he may request concerning the terms of the policy mentioned."

Very truly yours,

S. L. RUMSEY. [200]

June 17, 1907.

New York Life Insurance Company,
New York Life Bldg.,
New York City, N. Y.

Gentlemen:

I am in receipt of a letter from your secretary dated June 14, in replly to mine of the 8th, concerning the policy on the life of S. L. Rumsey. I herewith enclose Mr. Rumsey's written request for information and beg to ask that you furnish me with the date of the policy, amount of premium, when and by whom paid, copy of beneficiary clause and the other conditions of the policy, if any, not found in policies generally.

I do not care for a copy of the policy, I desire to know its terms and conditions in a brief way.

Very truly,

T. J. O'DONNELL. [201]

New York, June 27, 1907.

Mr. T. J. O'Donnell,
822 Ernest & Cranmer Blk.,
Denver, Colo.
Re Pol. No. 3,442,989—Rumsey.

Dear Sir:

Replying to your esteemed favor of the 17th inst.

we beg to inform you that according to our records, this policy was issued on the 11th day of June, 1903, for $5,000 on the Ordinary Life 15-Year Accumulation plan at age 49, with an annual premium of $232.30; and that according to our records the premiums on said policy are paid to June 11th, 1907.

The policy is written in favor of Benson, Smith & Co., Ltd., or its legal representatives, or to such other beneficiary as may be designated by the insured in accordance with the terms of the change of beneficiary clause in the policy, which reads as follows:

"The insured having reserved the right may change the beneficiary or beneficiaries, at any time during continuance of this policy, by written notice to the Company at the Home Office provided this policy is not then assigned. The insured may at any time by written notice to the Company at the Home Office, declare any beneficiary then named to be an absolute beneficiary under this policy. No designation, or change of beneficiary, or declaration of an absolute beneficiary, shall take effect until endorsed on this Policy by the Company at the Home Office. During the life time of an absolute beneficiary the right to revoke or change the interest of that beneficiary will not exist in the insured. If any beneficiary, or absolute beneficiary, dies before the insured, the interest of such beneficiary will become payable to the Executors, Administrators, or Assigns of the insured."

We cannot tell you when and by whom the premiums were paid, as we do not keep any record of the person who pays the premiums.

Trusting this information will answer your purpose, we remain,

Yours truly,

JOHN C. McCALL,

Secretary.

PER ERNEST FREDK. LAWES,

Supt. [202]

July 9th, 1907.

New York Life Insurance Company,
346-348 Broadway,
New York.

The beneficiary under policy No. 3,442,989, in accordance with the change of beneficiary clause thereof, is hereby changed from Benson, Smith & Co. to Emma Forsythe Rumsey.

The policy is not now assigned.

S. L. RUMSEY,

Insured.

JOHN W. GRAHAM, Jr.,
Witness. [203]

July 10th, 1907.

New York Life Insurance Company,
346-348 Broadway,
New York, N. Y.

Gentlemen:

Replying to your letter of recent date in regard to policy No. 3,442,989, which Mr. S. L. Rumsey holds in your company, we herewith enclose you form for changing the beneficiary, which you forwarded to us from Benson-Smith Company, to Emma Forsythe Rumsey, signed by the insured.

Will you therefore kindly change the name of the

beneficiary under this policy upon the books of your company and notify us when changed? (Mr. Rumsey is ready, able and willing to pay any and all premiums due under this policy and therefore when they are due will you kindly notify us and we will see that they are paid.)

Mr. Rumsey's present address is No. 801 N. Nevada Ave., Colorado Springs, Colo.

Very truly yours,
O'DONNELL & GRAHAM. [204]

New York, July 19, 1907.

Mr. L. Rumsey,
801 N. Nevada Ave.,
Colorado Springs, Colo.
Re Pol. No. 3,442,989—Rumsey.

Dear Sir:

We have your request for change of beneficiary at this office, and ask that you kindly send us the policy for endorsement.

Yours truly,
JOHN C. McCALL,
Secretary.
Per ERNEST F. LAWES,
Supt. E. M. [205]

July 22, 1907.

New York Life Insurance Co.
346-8 Broadway,
New York City.

Gentlemen:

We wrote you on the 10th inst. in regard to changing the beneficiary in policy No. 3,442,989, requesting

you to notify us when the change was made. We have not heard from you since that date and write this note to see if you received our letter. If you have, we would be pleased to receive a reply thereto.

Yours truly,

O'DONNELL & GRAHAM. [206]

New York, July 31st, 1907.

Messrs. O'Donnell & Graham,
822 Ernest & Cranmer Blk.
Denver, Colo.

Re Pol. No. 3,442,989—Rumsey.

Dear Sirs:

In reply to your favor of the 22nd inst. we beg to state that your letter of the 10th inst. was duly received by us, together with the *insured's* request for change of beneficiary. We wrote on July 19th direct to Mr. Rumsey, whose address you gave us in your letter, "asking him to send us his policy for necessary endorsement," after which it would be returned, but have as yet received no reply from him.

Yours truly,

JOHN C. McCALL,
Secretary,
Per ERNEST FREDK. LAWES,
Supt. J. S. [207]

New York, August 8th, 1907.

Messrs. O'Donnell & Graham,
822 Ernest & Cranmer Blk.
Denver Colo.

Re Pol. No. 3,442,989—Rumsey.

Sirs:

Kindly refer to our letter of the 31st ulto., and give this matter your attention.

Yours truly,
JOHN C. McCALL,
Secretary.
Per ERNEST F. LAWES,
Supt. M. M. [208]

August 29th, 1907.

New York Life Ins. Co.,
346 Broadway,
New York City.

Gentlemen:

We are in receipt of your letter of the 26th inst. We have written for the policy on the life of Mr. Rumsey, but so far have not yet received it. As soon as received we will immediately forward to you, so that you can endorse the change of beneficiary on the policy.

Yours truly,
O'DONNELL & GRAHAM. [209]

New York, 9/14/07.

Messrs. O'Donnell & Graham,
822 Ernest & Cranmer Blk.,
Denver, Colo.

Re Pol. No. 3,442,989—Rumsey

Gentlemen:

Kindly refer to our letter of the 31st of July, 8th and 26th of August, and give the matter referred to your immediate attention.

Yours truly,
JOHN C. McCALL,
Secretary.
Per ERNEST FREDK. LAWES,
Supt.
J. S. [210]

Sept. 19th, 1907.

New York Life Ins. Co.,
346–8 Broadway,
New York City.

Gentlemen:

We are in receipt of your letter of the 14th inst. in re policy of S. L. Rumsey, and immediately forwarded your letter to him with the request that he write you at once.

Yours truly,
(S.) O'DONNELL & GRAHAM. [211]

New York, Oct. 5, 1907.

Messrs. O'Donnell & Graham,
822 Ernest & Cranmer Blk.,
Denver, Colo.
Re Pol. No. 3,442,989—Rumsey.

Dear Sirs:

Referring to your letter of the 19th ulto., would advise that you might inform the insured that unless we hear from him within a reasonable length of time, we will return the request for change of beneficiary, with our records unchanged.

Yours truly,
JOHN C. McCALL,
Secretary.
Per ERNEST F. LAWES,
Supt., E. M. [212]

October 17th, 1907.

New York Life Ins. Co.,
336 Broadway, New York City.
Re Pol. No. 3,442,989—Rumsey.

John C. McCall, Sec'y.

Dear Sir:

Replying to yours of Oct. 5th, 1907, we beg to state that we are anticipating advices from Honolulu complying with our request to return the policy so that it may be forwarded to you, and the change in beneficiary made. Failing to receive the policy from Honolulu we shall take the necessary legal steps to secure its return.

We do not see why you should return the request for change of beneficiary, nor do we see that the re-

turn of the same can change the legal rights of any of the parties, no more can the retention of the same by you.

Very truly yours,
T. J. O'DONNELL. [213]

New York, 10/25/07.

Mr. T. J. O'Donnell,
822 Ernest & Cranmer Blk.,
Denver, Colo.
Re Pol. No. 3,442,989—Rumsey.

Dear Sir:

Answering your letter of the 17th inst. we beg to state that we have, as requested, place the *insured's* request for change of beneficiary on file, but beg to inform you that no change of beneficiary takes effect unless endorsed on the policy by the company. We would therefore request that you forward the said policy to us as soon as possible for necessary endorsement.

Yours truly,
JOHN C. McCALL,
Secretary.
Per E. F. LAWES,
Supt. [214]

October 29th, 1907.

New York Life Ins. Co.,
John C. McCall, Sec'y,
346 Broadway,
New York City.
Re Pol. No. 3,442,989—Rumsey.

Dear Sir:

Acknowledging yours of the 25th, I beg to state

that I am aware of the company's rule in respect to change of beneficiary, as stated in the letter.

In the present instance, however, the policy is detained against the right of the insured, and will be forwarded as soon as possession of it is secured.

Yours truly,

T. J. O'DONNELL. [215]

VII.

That on the 11th day of June, 1910, the said petitioner, Emma Forsyth Rumsey, through her attorney T. J. O'Donnell, delivered to one A. R. Fleming who was then in charge of the local office of the said respondent, New York Life Insurance Company in the city of Denver, State of Colorado, the sum of $232.30, being the amount of the annual premium upon the said policy so issued to the said Samuel L. Rumsey which became due and payable on said 11th day of June, 1910. That the said sum of $232.30 was tendered by the said T. J. O'Donnell as attorney for the said petitioner, Emma Forsyth Rumsey, to the said A. R. Fleming as the Agent of said respondent, New York Life Insurance Company, as and for the premium on said policy of insurance due on said 11th day of June, 1910. That the said A. R. Fleming received said sum of $232.30 so tendered, and forwarded the same to the Home Office of the said [216] respondent, New York Life Insurance Company in the city of New York. That upon receiving said sum of $232.30, the said A. R. Fleming gave to the said T. J. O'Donnell a receipt therefor in the following words and figures, to wit:

"RECEIVED from T. J. O'DONNELL $232.30 for his accommodation and at his request, with the understanding that I am to forward it for him to the Home Office of the New York Life Insurance Company, where the record is kept of Policy No. 3442989; that neither I nor the office of said Company with which I am connected, have any record or knowledge of said policy, or authority to collect a premium upon it, or otherwise to take any action of any kind about it.

Executed in duplicate at Denver, Colo. this 11th day of June 1910.

A. R. FLEMING."

That the said T. J. O'Donnell as the attorney for the said petitioner, Emma Forsyth Rumsey, consented to the terms and conditions of such receipt and endorsed upon said receipt the following:

"The terms of the above receipt assented to

T. J. O'DONNELL."

That neither the said A. R. Fleming nor the said office of the said New York Life Insurance Company with which he was connected had at any time any record or knowledge of said policy of insurance.

That at the time said tender was so made, the premium on said policy of insurance was payable only at the Home Office of the said New York Life Insurance Company in the city of New York, [217] or to an agent of the said respondent New York Life Insurance Company, "holding its official receipt." That said official receipt at the time of said tender was not at the Denver office of the said respondent,

New York Life Insurance Company, but that for some time prior to the 9th day of June, 1910, said official receipt had been in the office of said respondent, New York Life Insurance Company, in the city and county of Honolulu, Territory of Hawaii, for the collection of said premium, and that on said 9th day of June, 1910, the said premium so due on said 11th day of June, 1910, was paid to said respondent, New York Life Insurance Company, at its said office in the city and county of Honolulu by the said respondent, Benson, Smith & Company, Limited. That at the time said sum of $232.30 was so tendered by said petitioner, Emma Forsyth Rumsey, on said 11th day of June, 1910, none of the officers or agent of the said respondent, New York Life Insurance Company, in said city of Denver, State of Colorado, and none of the officers of said respondent, New York Life Insurance Company, at its Home Office in the city of New York, knew that the said premium due on the said 11th day of June, 1910, had been paid to the Agent of said respondent, New York Life Insurance Company, at the city and county of Honolulu, nor was such fact known either to the Agents of said respondent in the said city of Denver, or to its officers or agents at its said Home Office until the receipt at the said Home Office of the letter of James A. Gorman, resident manager, dated July 5th, 1910, elsewhere in this stipulation set out in full, which said letter was received at the Home Office of the respondent, New York Life Insurance Company, in due course of mail and on, to wit, the 15th day of July, 1910. [218]

That in due course of the mail the said sum of $232.30 so tendered to said respondent, New York Life Insurance Company by said T. J. O'Donnell was transmitted by the Branch Office of said respondent at the city of Denver, State of Colorado, to the Home Office of said respondent in the city of New York, and thereafter, and on the 29th day of August, 1910, said respondent, New York Life Insurance Company, at the office of Messrs. O'Donnell & Graham, attorneys for the said petitioner, in the city and county of Denver, State of Colorado, tendered back unconditionally to the said O'Donnell and Graham, attorneys for petitioner, who there and then had full power and authority to act in the premises, the said sum of $232.30 in lawful money of the United States, and the further sum of $4.05 in lawful money of the United States, being the interest accruing upon said sum of $232.30 between the 11th day of June, 1910, and the day of said tender, to wit, the 29th day of August, 1910, and that the tender so made by the said respondent on the 29th of August, 1910, was by the said attorneys refused. That thereafter the said respondent, New York Life Insurance Company, in the suit herein referred to instituted by the said Emma Forsyth Rumsey against the said New York Life Insurance Company in the District Court of the city and county of Denver, State of Colorado, offered to pay into court for the use and benefit of said Emma Forsyth Rumsey and did pay into court for her use and benefit the said sum of $232.30 and said interest thereon amounting to $4.05, and said respondent has not since that time had or received

said sums or any part thereof in its possession. That the petitioner refused to receive said sum so tendered into court and has never had possession thereof. [219]

That the Supreme Court of the State of Colorado upon the hearing of the case of Emma Forsyth Rumsey, plaintiff in error, vs. New York Life Insurance Company, defendant in error, on error to the District Court of the city and county of Denver, State of Colorado, and being in the same suit or proceeding so instituted by the said Emma Forsyth Rumsey against the said New York Life Insurance Company, a corporation, in said District Court of the city and county of Denver, State of Colorado, on the 1st day of March, 1915, duly rendered its decision and opinion, and in said opinion, in passing upon the effect of the tender by the said Emma Forsyth Rumsey to the said respondent, New York Life Insurance Company as aforesaid, held and said:

> "The evidence concerning the change of beneficiary and the alleged waiver by the company consist of the written instrument calling for the change and certain correspondence between counsel for the plaintiff, who was also counsel for the insured and the insurance company. This correspondence extended over a period of about three years. It would accomplish no good purpose to insert it in an opinion. *A careful study of it leads to no other conclusion than that it fails to disclose any waiver by the company,* but, to the contrary, it discloses that the company at all times insisted that this requirement

be complied with. *If the question of waiver involved the keeping of the policy alive upon account of the alleged tender and receipt by the company of the payment of one premium by counsel,* it would then present an entirely different aspect, and a large number of cases cited by plaintiff would be in point."

That the following are true and correct copies of letters, etc., duly forwarded and received by the respective senders, addressee and recipients as by said letters, etc., indicated, bearing upon and relating to the said matter of tender of premium, etc., and bearing upon and relating to the matters in controversy in the above-entitled cause. That all of said letters, etc., may be considered by the Court to be in evidence in the above-entitled cause in so far as the same, or any part or portion thereof, may be material to the issues in the cause or relevant thereto. [220]

CABLEGRAM.

Jul. 3, 1907.

John C. McCall,
Sec'y New York Life Ins. Co.,
346 B'way,
New York.

Has current premium on policy numbered three four four two nine eight nine rumsey mentioned yours twenty seventh ultimo been paid if not ready to pay same on behalf of insured.

T. J. O'DONNELL.

ALWAYS OPEN. MONEY TRANSFERRED BY TELEGRAPH. CABLE OFFICE. [221]

New York, July 5, 1907.

T. J. O'Donnell,
822 Ernest & Cranmer Blk.
Denver, Colo.

June 07 premium on Rumsey policy has not been paid.

JOHN C. McCALL,
Secretary. [222]

May 6th, 1910.

New York Life Insurance Company,
New York Life Building,
New York City,
John C. McCall, Secretary.

In re Policy No. 3,442,989, on the life of Samuel L. Rumsey.

Dear Sir:

In the year 1907, we had some correspondence respecting the above mentioned policy. I beg to refer to our letters to your company of the following dates: June 8th, 17th, July 2nd, telegram, July 10th, 22nd, October 17th and October 29th, 1907, and your communications of June 14th, 27th, July 5th, telegram, July 19th, 31st, August 8th, September 14, October 5th, 25th.

We beg now to advise you that we still represent the insured, Mr. Samuel L. Rumsey, and that we also represent Emma Forsythe Rumsey, in whose favor Mr. Rumsey made a change of beneficiary under said policy, which was forwarded to you in our letter of July 10th, 1907, and concerning which subsequent correspondence was had.

We beg to notify you that Emma Forsythe Rumsey claims to be the beneficiary under the said policy in accordance with the said change; this without in any manner seeking to prejudice you by reason of the fact that the notice changing the beneficiary was not returned, as proposed by you in your letter of October 5th, but was placed on file, in accordance with your letter of October 10th, 1907, and fully recognizing your position that you decline to consider the change as made until it is endorsed on the policy, by the company.

Our position, and the position of our clients, in this respect is that under this notice, and under the circumstances of this case, you are permitted to deal with this policy either by way of surrender, loan or payment in case of death, or otherwise, except at your own risk, without the consent of Emma Forsythe Rumsey.

We beg to further notify you that about the time of the commencement of our former correspondence, Mr. Samuel L. Rumsey ceased to be a stockholder in the corporation known as Benson-Smith & Co., Ltd.; that he assigned his remaining shares of stock to his wife, Emma Forsythe Rumsey, and that while Benson-Smith Co., Ltd., refused for sometime thereafter to transfer this stock upon the books of the company, such transfer was actually made about the month of March last.

You were advised by our previous correspondence that the connection of Mr. Samuel L. Rumsey with this company practically ceased some years ago, as stated in the letter of June 8th.

We beg to advise you that Emma Forsythe Rumsey, as a stockholder of Benson, Smith & Co., Ltd., has forbidden that company to pay any further premium on this policy; and has notified said [223] company that she claims to be the beneficiary thereunder, and that she will claim the benefits thereof when the said policy matures.

We beg to notify you that we desire to make tender of the annual premium, which as we understand, will become due June 11th, 1910, and that we will have such tender made at your office in New York, unless you feel that you can advise us that it may be made at the office of your company in Denver, a procedure which would save us some trouble, or advise us that in any event, you will not receive or accept our tender, which of course will do away with the necessity of a tender.

We beg to advise you that we are not seeking to in any way prejudice, annoy or harrass your company, but simply taking such steps as we deem advisable in order to protect the rights of our clients in this policy.

We would ask that you kindly acknowledge receipt of this letter.

Very truly,

O'DONNELL & GRAHAM. [224]

New York, 5/13/10.

Messrs. O'Donnell & Graham,
822 to 826 Ernest & Cranmer Blk.,
Denver, Colo.
Re. Pol. No. 3,442,989—Rumsey.

Gentlemen:

We acknowledge due receipt of your favor of the 6th inst. which has been placed on file and duly noted on our records. You can make tender of the premiums due at our office in Denver, if you so desire.

Yours truly,
JOHN C. McCALL,
2nd Vice-Pres.
Per ERNEST FREDK. LAWES,
Supt. [225]

May 16th, 1910.

New York Life Insurance Company,
346 Broadway, N. Y.
In re Policy 3,442,989—Rumsey.

Gentlemen:

We beg to acknowledge and thank you for yours of the 13th inst.

In pursuance therewith, we shall make tender of the premium mentioned, at your office in Denver, Colorado.

Very truly,
O'DONNELL & GRAHAM. [226]

June 10th, 1910.

Claude E. Griffey, Esq.,
Agency Director New York Life Ins. Co.,
New York Life Office, Jacobson Bldg.,
17th and Arapahoe Streets,
Denver, Colorado.

In re Policy No. 3,442,989, on Life of Samuel L. Rumsey.

Dear Sir:

I desire to make tender to the New York Life Insurance Company of $232.30, in payment of the annual premium due June 11th, 1910, on above mentioned policy, and in pursuance of some recent correspondence with the company and particularly of advice from the company dated May 13, 1910, with reference to this matter, I am advised that I can make tender of this premium at the office in Denver, with the same effect as if made in New York.

As in our conversation this morning you advised me that you would accept the money for remittance to the Home Office in New York, and that my check would be acceptable, and that I need not take the trouble to make the legal tender, I herewith enclosed you my check in favor of the New York Life Insurance Company for $232.30.

I will thank you to send me a receipt, which you indicated in your conversation this morning you would give for the money.

I shall expect to hear from you further when you have been advised by the Home Office.

Very truly,

T. J. O'DONNELL,

Attorney for S. L. Rumsey and Emma Forsythe Rumsey. [227]

Denver, 6–10–10.

Mr. T. J. O'Donnell,
822 E. & C. Bldg.,
Denver, Colo.

Dear Sir:

We acknowledge receipt of your favor of the 10th inst., enclosing check for $232.30, which you state is tendered in payment of annual premium due June 11, 1910, under policy No. 3,442,989.

As we have no record of this policy at this office, in accordance with Home Office instructions, we return herewith receipts in duplicate for the amount received only for transmission to the Home Office in New York.

Kindly sign and return one copy of this receipt, form 2960 B by return mail in the enclosed stamped envelope. Upon receipt of this duplicate receipt, we will then transmit to the Home Office.

Very truy yours,

A. R. FLEMING,
Cashier. [228]

June 11th, 1910.

New York Life Insurance Company,
New York Life Building,
New York City.

In re Policy No. 3,442,989—S. L. Rumsey.

Gentlemen:

In pursuance of our recent correspondence and permission to that effect contained in yours of the 13th ult., we, on yesterday, paid your office in Denver $232.30, annual premium on this policy, due today.

Your Denver office, having no advices on the subject, has accepted the money for forwarding only and given receipt accordingly.

We shall be pleased to have your early advices as to whether this payment is accepted.

Very truly,
O'DONNELL & GRAHAM. [229]

New York, June 17, 1910.

Messrs. O'Donnell & Graham,
822–826 Ernest & Cranmer Blk.,
Denver, Colo.

Re Pol. No. 3,442,989—Rumsey.

Gentlemen:

We have your letter of June 11th regarding the above mentioned policy. We have to inform you that we are now in receipt of advice from our Colorado Branch, located at Jacobson Building, Denver, Colo., that they received from you $232.30, on account of the premium due June 11, 1910, which amount will carry the policy up to June 11th, 1911.

We have this day written to our Honolulu Branch,

Honolulu, H. I., which office has in charge the collection of premiums, directing them to countersign renewal receipt and forward same to you.

Yours truly,

E. A. ANDERSON,

Comptroller. [230]

NEW YORK LIFE INSURANCE COMPANY,

346 & 348 Broadway, New York.

Darwin P. Kingsley, President.

Comptrollers' Department.

New York, June 7, 1910.

To Cashier:

Honolulu Branch.

Re Pol. No. 3,442,989.

Dear Sir:

We have in receipt of advice from our Colorado Branch, that they have received from T. J. O'Donnell c/o O'Donnell & Graham of 822 Ernest & Cranmer Block Denver, Colorado, $232.30 on account of Policy No. 3,442,989, Rumsey.

Our records show receipt for premium and policy loan interest due June 17, 1910, was sent to your office for collection.

Please report this premium and interest, and charge $232.30 in Column 6 of Form 2175, stating in Column 5, policy number and "To take up credit balance from Colorado Branch."

Renewal receipt should be countersigned and forwarded to Payer at above address.

Very respectfully,
F. A. JACKSON,
Comptroller,
T. R. [231]

NEW YORK LIFE INSURANCE COMPANY.

Honolulu, T. H., July 5, 1910.

Mr. F. A. Jackson, Comptroller,
N. Y. Life Ins. Co.,
New York City.

Re Policy No. 3442989—Rumsey:

Dear Sir:

I beg to acknowledge receipt of your for, 3191 of the 17th ult. (File C–3442989) and in reply will state that the premium of $232.30 due June 11, 1910, on the above numbered policy was paid at this office on June 9th by the beneficiary, Benson, Smith & Company, Limited, of Honolulu, and receipt covering same delivered to them. As I understand it the premiums have always been paid by the beneficiary.

Yours truly,
(S.) JAS. A. GORMAN,
Resident Manager.

JAG–C. [232]

VIII.

That the following are true and correct copies of other letters, etc., duly forwarded and received by the respective senders, addressees and recipients, as by said letters, etc., indicated, bearing upon and relating to the matters in controversy in the above-

entitled cause. That all of said letters, etc., may be considered by the Court to be in evidence in the above-entitled cause in so far as the same, or any part or portion thereof, may be material to the issues in the cause or relevant thereto. [233]

Law Offices of
O'Donnell & Graham,
822–826 Ernest & Cranmer Block,
Denver, Colo.

May 7th, 1910.

Benson, Smith & Co., Ltd.,
Honolulu, T. H.

Gentlemen:

As the attorneys of Emma Forsyth Rumsey, a stockholder in your corporation, and on her behalf, we beg to advise you that as a stockholder in your corporation, Emma Forsyth Rumsey forbids that you should pay any further premiums upon policy No. 3,442,989 in the New York Life Insurance Company, upon the life of Samuel L. Rumsey, her husband, in which policy your company is named as beneficiary.

On July 10, 1907, Mr. Samuel L. Rumsey, under his hand, executed a change of beneficiary from Benson-Smith & Co. Ltd. to Emma Forsyth Rumsey, in accordance with the change of beneficiary clause of the said policy, of which fact you were at that time notified.

We have advised Mrs. Rumsey, and as well Mr. Rumsey, what we concede to be the law concerning this matter and as a result thereof, we are instructed

to state that the position of both Mr. and Mrs. Rumsey is that if you ever had any rights as beneficiary under said policy, these rights ceased when Mr. Rumsey ceased his connection with the company, and that his connection with the company ceased finally when he transferred his remaining stock in the company, of which fact you were advised in the year 1907, or thereabout, although you only transferred this stock to his wife, Emma Forsythe Rumsey, in the present year.

We demand that you turn over and deliver this policy to the insured, or the present beneficiary, Emma Forsythe Rumsey.

We hereby offer, on their behalf, to refund to you the premiums paid by you since Mr. Rumsey ceased his connection with the company, together with legal interest thereon since the payments were respectively made by you, upon being advised of the amount.

We shall tender to the insurance company the amount of the annual premium due June 11th, 1910.

We beg to suggest that the retention by you of this policy is against right; that an examination of the law on the subject by your counsel will result in your being advised that you cannot claim anything more than an equitable lien upon the policy for such premiums as you have paid and for which you are entitled to be reimbursed, and that the adjustment of this matter would be to the advantage of all concerned, saving you, as well as our clients, the expense of needless litigation.

We believe that under the law, you have no right, as a corporation, to expend the corporate funds for

the payment of premiums upon this policy, and that any such payment hereafter made will constitute an improper diversion of the funds of the company, of which any stockholder has a right to complain. [234]

We beg to thank you in advance for an acknowledgment of this letter.

Yours truly,

(S.) O'DONNELL & GRAHAM,

OD. G. [235]

Honolulu, T. H., May ——, 1910.

Messrs. O'Donnell & Graham,

Denver, Colo.

We have received your letter of the 4th inst., and thank you for the legal opinion it contains. We believe it will not be necessary to take legal proceedings against the New York Life Insurance Company to enforce our claim to the amount which became payable to us by the terms of the policy on Mr. Rumsey's death, but, if it be necessary to do so, we shall naturally seek the advice of lawyers versed in the law of the state or territory where the suit will be commenced. The question of our claim against the Insurance Company is not one, we think, in which Mrs. Rumsey is interested, except as a shareholder of the Company. We are prepared, however, to treat with Mrs. Rumsey for the purchase of her shares.

Our books are regularly audited by the Audit Company of Hawaii, a corporation of chartered accountants; and, pursuant to our custom, a copy of the annual statements of the affairs of the Company was

regularly sent to Mr. Rumsey in his lifetime. His receipt for the statement for the year 1909, is dated Los Angeles, April 18, 1910. A copy of future statements will be forwarded to *Mr.* Rumsey as long as she continues a shareholder of the Company.

In April last we were offered, by the First National Bank of this City, acting for Mr. Rumsey, his shares at par, an offer we declined.

We offer par or $100.00 per share for the shares now; and on delivery to the Colorado National Bank Denver of Certificate No. 31 and 32 of this Company for fifty shares of the capital stock of the Company, duly endorsed by Mrs. Rumsey, that bank will pay over to her $5,000 on our account.

The offer is made independent of any claim Mrs. Rumsey may have against the New York Life Insurance Company in respect of the policy on the life of her late husband issued by that Company and payable to us.

Yours very truly,
BENSON, SMITH & CO., LTD. [236]

HOLMES, STANLEY & OLSON,
Attorneys at Law.
Honolulu, T. H., May 26, 1910.

Messrs. Benson, Smith & Co., Ltd.,
Honolulu, T. H.

Dear Sirs:

In accordance with your instructions, we have examined policy No. 3442989 issued by the New York Life Insurance Company insuring the life of Samuel L. Rumsey in the sum of $5000 payable to you as

beneficiary, with reference to the letter of Messrs. O'Donnell & Graham, Attorneys of Emma Forsythe Rumsey, wife of said Samuel L. Rumsey, to you under date of May 7th, 1910, and we now beg to advise you that in our opinion Mrs. Rumsey and Mr. Rumsey are not entitled to receive the policy in question even upon the payment to you of the premiums so far paid on account of the policy with interest.

While under the terms of the policy, the insured, Samuel L. Rumsey, is given the right to change the beneficiary under the policy, the policy expressly provides that no change of beneficiary shall take effect until endorsed on the policy itself by the Insurance Company at its home office. As you hold the policy, and the policy was originally taken out for your benefit only and all premiums have been paid by you, in our opinion no change can be effected eliminating you as the beneficiary under the policy without your voluntary delivery of the policy to the Company so that the change of beneficiaries can be endorsed on the policy.

The language of the letter of Mrs. Rumsey's attorneys appears to suggest that possibly you may never have had any rights as beneficiary under the policy. We presume that if this inference was intended to be drawn, it was based upon the assumption that you would have no rights under the policy because you could show no insurable interest in the life of the insured.

However, in our opinion, your Company had an insurable interest in Mr. Rumsey's life as a stockholder and officer of the Company and as one whose

stock, unless it could be taken up by the Company, might by being distributed or sold to persons adversely interested to the Company, affect the Company disadvantageously.

The fact that Mr. Rumsey has disposed of his stock and therefore you have no further interest in his life, does not affect the validity of the policy. As a matter of law, if you had, as we believe you had, an insurable interest at the time that the policy was effected, the policy remains valid and enforceable notwithstanding the subsequent cessation of that interest.

Mrs. Rumsey's attorneys further claim that you as a corporation have no right to expend corporate funds in the payment of premiums on the policy. While we have not examined your Articles of Association and therefore cannot advise you definitely on this point, we are inclined to believe that your corporate interests were sufficiently involved at the time that the policy was taken out to justify the expenditure of corporate funds in the payment of premiums thereon, especially [237] as we understand that all of the stockholders in the Company consented to the same; and as the policy has an intrinsic value in itself, we think that you may legally protect it by paying the premiums still to accrue.

We advise you to pay the next premium due on the 11th day of June, 1910, unless the matter has been adjusted or settled before that time.

Very truly yours,

(S.) HOLMES, STANLEY & OLSON,

CHO/D. [238]

Honolulu, T. H., June 30, 1910.

Messrs. O'Donnell & Graham,
822 Ernest Cranmer Block,
Denver, Colo.

Gentlemen:—

In re Emma Forsythe Rumsey:

Your letter of May 7th, 1910, has been under consideration by the directors of the Company. On the 11th *curt,* we paid the premium due on Policy No. 3,442,989 of the New York Life Insurance Company on the life of S. L. Rumsey and we shall pay these premiums in the future when they become due. We are advised by our Counsel that our interest in the policy is unchanged by any attempt on the part of Mr. Rumsey to change the beneficiary, and that even if the Court were to hold that the application of the moneys of the Company in paying the premiums on the insurance on Mr. Rumsey's life to be ultra vires it would merely order a sale of the policy or its surrender in the interests of the stockholders of the Company and not of Mrs. Rumsey specially.

We are not without sympathy for the Rumseys because of Mr. Rumsey's sickness, but the directors, as trustees for the stockholders, cannot part with the assets of the Company without receiving a good consideration for the same. In April last it was intimated to us that Mrs. Rumsey would like to sell her fifty shares of the Company; the directors have considered the question of their purchase and at the same time that of the sale of the policy.

Without prejudice, the Company will assign the policy and pay $1000.00 in addition for the 50 shares

now standing in Mrs. Rumsey's name on the books of the Company.

We ask that you submit this offer to your clients and advise us, at any early date, of their decision.

We are,

Yours very truly,
BENSON, SMITH & CO., LTD.,
(Signed) GEO. W. SMITH,
Pres. & Manager. [239]

October 4, 1910.

Benson, Smith & Co., Ltd.,
Honolulu, H. T.

Gentlemen:—

In accordance with our letter of July 15th replying to yours of June 28th, we beg to say, that you are undoubtedly aware of the death of Mr. Rumsey. His final illness commenced shortly after our letter, and our client Mrs. Rumsey was naturally unable to give any attention to business affairs during the remainder of Mr. Rumsey's life, and for some time after his death.

Since the death of Mr. Rumsey we have taken up with Mrs. Rumsey very fully the matter of your claim to the insurance policy, and as well the matter of the sale of the stock in your company owned by her, and she has recently forwarded us your letter of September 20th in regard to the stock.

You are undoubtedly aware that Mr. Rumsey had a very high opinion of the value of this stock, which opinion was communicated to Mrs. Rumsey, and is still held by her; and she feels that unless your cor-

poration is in bad condition, or has made losses not disclosed in any of the reports sent to Mr. Rumsey in his lifetime, that to take par for the stock would be a sacrifice which she ought not to be called upon to make. She feels that inasmuch as you have paid no dividends for several years, you must have added earnings to the surplus or otherwise disposed of them to the betterment of the condition of the concern, and that she should reap in the selling price the value of these deferred dividends which ought to equal at least 7% per annum, and this seems reasonable to us.

Mrs. Rumsey is of the opinion, and we believe has had some information to the effect that this stock could be marketed in Honolulu, perhaps in small lots, and that she could dispose of part of it in that way which might enable her to retain the remainder. All this, of course, depends upon the condition of your firm, and so it seems to us that a statement of the condition of the firm at the present time should accompany this offer, and we feel that as a stockholder Mrs. Rumsey is entitled to this, and that you will not hesitate to give it, considering the long association of her late husband with the members of your firm.

We are of the opinion, and shall so advise Mrs. Rumsey, that she should not consider the offer of par for the stock until she has ascertained what its market value is, or what can be obtained for it in Honolulu; and inquiry which she could make through some trust company or bank, or attorney; unless as part of the transaction involving the sale of the stock there is included a settlement of the dispute with respect to the insurance policy. [240]

We are of the opinion, after a full investigation of the authorities upon the subject, that the furthest any court will by any possibility go in holding that a corporation has an insurable interest in the life of one of its officers, is to hold that it may have such insurable interest while the relation continues; but that upon the severance of the relation the corporation ceases to have an interest in the policy. Our own opinion is that there can be no such interest at any time. But in any litigation in which you might engage you would be compelled to take the contrary position, and it therefore seems to us that the premiums paid during the time Mr. Rumsey was connected with the association cannot be recovered by you, as such recovery will be inconsistent with your claim; a claim which it is unnecessary for us to dispute inasmuch as we are content, and it is to the advantage of our client, if it shall be decided that the interest of your corporation ceased when Mr. Rumsey terminated his connection with the corporation. Under such a holding, which we feel sure will be the holding of the courts of this state, you could not recover the premiums paid during Mr. Rumsey's connection with the firm. You could probably recover those paid since Mr. Rumsey's connection with the firm ceased, unless it should be held that those made since notice to you were voluntary payments which you are not entitled to recover. What we have said as to our views of the law is wholly without reference to the right of Mr. Rumsey to change the beneficiary, which under the terms of the policy, you never having been made a designated beneficiary, it seems to

us cannot be questioned. We have advised Mrs. Rumsey that you are not in a position to take advantage of the fact that the change of beneficiary was not endorsed upon the policy, because to allow your corporation to do this would be to allow it to take advantage of its own wrong doing; for if we are correct in our position that Mr. Rumsey had a right to change the beneficiary then your act in retaining possession of the policy was a wrongful act, and renders the maxim referred to applicable.

Desiring, however, to facilitate the settlement of this matter, if the same can be made upon reasonable terms, we have advised Mrs. Rumsey, and she has authorized us to say, that she will accept par for the stock, and allow you to deduct from the price thereof at par the proportionate share of the premiums paid during Mr. Rumsey's connection with the company, which his (Mr. Rumsey's) stock during that time bore to the total stock then issued and outstanding; this is on the theory that if Mr. Rumsey had died during that period, that policy might have been collected by the company, and such collection of it would have inured *pro rata* to the benefit of Mr. Rumsey's stock, which stock would of course have gone to his estate.

As this letter is being written somewhat hurriedly, on account of the fact that the writer is compelled to leave the city within a few hours, we don't take the trouble to state the figures, as they are better known to you than to us. If you accept our proposition you can send us the result in the form of a statement. In addition to this *pro rata* for premiums paid during the time of Mr. Rumsey's connection with the

company, we will allow you to deduct from the price of the stock all premiums since paid, including the premium paid by you in June last, with interest at 8% from the time the said premiums were respectively paid. In the event of your acceptance of [241] this offer we expect you to prepare a statement of the result arrived at, and send it to us. If it should be satisfactory, we would then cable our acceptance, and thereupon require that you forward the policy, duly assigned under the seal of the company, to a bank in Denver, to which you would remit at the same time sufficient funds to pay Mrs. Rumsey the amount due her on this basis, upon her delivery to the bank for remittance to you of her certificate of stock in your company, duly assigned as you may direct, or indorsed in blank, according to your pleasure. Trusting that this solution of a somewhat disagreeable circumstance may meet with your approval, and that thereby litigation may be avoided, we await your further advises on this subject.

Mrs. Rumsey requests us to call the attention of your Mr. Smith to the fact that Mr. Rumsey left some articles which he valued on account of their association, particularly a clock, steamer chair, and some other articles of which she has a list, in Honolulu, and to ask you that the same be cared for until she directs what disposition is to be made of them. It seems that Mr. Rumsey was anxious that she should have these articles as momentos of him.

Mrs. Rumsey has likewise requested that we express to Mr. Smith her appreciation of his words of

sympathy contained in the letter of September 20th.

Yours very truly,

(S.) O'DONNELL & GRAHAM. [242]

Nov. 1, 1910.

Messrs. O'Donnell & Graham,

Denver, Col.

Gentlemen:

We have received your letter of the 4th inst., and thank you for the legal opinion it contains. We believe it will not be necessary to take legal proceedings against the New York Life Insurance Company to enforce our claim to the amount which became payable to us by the terms of the policy on Mr. Rumsey's death, but, if it be necessary to do so, we shall naturally seek the advice of lawyers versed in the law of the state or territory where the suit will be commenced. The question of our claim against the Insurance Company is not one, we think, in which Mrs. Rumsey is interested, except as a shareholder of the Company. We are prepared, however, to treat with Mrs. Rumsey for the purchase of her shares.

Our books are regularly audited by the Audit Company of Hawaii, a corporation of chartered accountants; and, pursuant to our custom, a copy of the annual statements of the affairs of the Company was regularly sent to Mr. Rumsey in his lifetime. His receipt for the statement for the year 1909, is dated Los Angeles, April 18, 1910. A copy of future statements will be forwarded to Mrs. Rumsey as long as she continues a shareholder of the Company.

In April last we were offered, by the First National

Bank of this City, acting for Mr. Rumsey, his shares at par, an offer we declined.

We offer par or $100.00 per share for the shares now; and on delivery to the Colorado National Bank, Denver, of Certificates Nos. 31 and 32 of this Company for fifty shares of the capital stock of the Company, duly endorsed by Mrs. Rumsey, that bank will pay over to her $5,000 on our account.

The offer is made independent of any claim Mrs. Rumsey may have against the New York Life Insurance Company in respect of the policy on the Life of her late husband issued by that Company and payable to us.

Yours very truly,

BENSON, SMITH & CO, LTD.,

(Signed) GEO. W. SMITH,

Pres. & Manager. [243]

Nov. 22d, 1910.

Messrs. Benson-Smith & Co. Ltd.,

Honolulu, T. H.

Gentlemen:—

Yours of the first inst., in answer to ours of the 4th ult. was duly received.

We note, with surprise, that you decline to comply with the request of Mrs. Rumsey, contained in our letter, for a statement of the condition of the company.

We must decline to advise Mrs. Rumsey to sell her stock in your corporation until she has been permitted access to information, to which we consider her entitled, and which is necessary to enable her to form any idea of the value of her shares.

Evidently you propose to take the funds of the corporation to buy Mrs. Rumsey's shares in the corporation. In other words, you propose to pay Mrs. Rumsey for her property, in part at least, with her own money, and to keep her, while doing this, in ignorance of that which she is entitled to know, and you have, apparently, so far, carried out this purpose, as to send $5000 of the corporate funds to Denver upon this unlawful errand.

We do not believe that the laws of these United States, or any of the Territories thereof, will tolerate such action.

Mrs. Rumsey will probably visit the Islands in person during the Winter and unless she finds a purchaser for her shares at satisfactory price at or befor that time, will then take steps we have advised for the protection of her rights.

Mrs. Rumsey instructs us to acknowledge and thank you for yours of the first, addressed to her personally, in re personal effects of her late husband.

Thanking you for your courteous letter, we beg to remain,

Very truly yours,

O'DONNELL & GRAHAM.

OD. G. [244]

(Reply to Letter of Nov. 22, 1910.)

From O'Donnell & Graham.

The insinuation in reference to statement of business condition is without foundation in fact.

We did not decline to furnish you with a statement. We advised you that our books were regularly audited by a Chartered Audit Co., and that we held

Mr. Rumsey's receipt for the last statement sent him. On receipt of your last letter we requested the Audit Company to prepare a statement as of Sept. 30th, 1910. This they proceeded to do near the end of October, handing us the result in the middle of November a copy of the statement to which Mrs. Rumsey is entitled as well as other stockholders, goes forward by present mail. We prefer, however, to place this directly in Mrs. Rumsey's hands.

We have not transferred One Dollar of Corporation Funds to the Bank in Denver. At the request of our Mr. Geo. Smith, our Bankers, Mess. Bishop & Co., established a *Credit* with a Bank in Denver for $5000 for the purpose of taking up Mrs. Rumsey's shares should she care to sell. Our Mr. Smith is personally prepared to borrow the necessary amount to pay Mrs. Rumsey, on his personal notes.

We are fully advised, by the Attorneys of this Corporation of our rights and duties and are prepared at all times to fully defend our position in this matter.

BENSON-SMITH & CO., LTD. [245]

PALACE HOTEL,
San Francisco.
January 11th, 1911.

Mr. George W. Smith, President,
Benson Smith & Company,
Honolulu, Hawaii.

My dear Mr. Smith:

Your letter was duly received. Mr. O'Donnell always mails me a copy of all the letters he sends, and also of all answers received.

I take this opportunity to tell you that he and Mrs. O'Donnell are very particular, personal friends. He is quoted—usually by his enemies, as well as others—as being the head of the Denver Bar and an authority on Law. He is a very high-priced man,—we could not have had him at all had it not been for the fact that he takes our work rather for personal than pecuniary interests. Personally, I never had a Law Suit and this suit, Louis practically began with Mr. O'Donnell in 1906. I, after his death, only followed his instructions and took it up as he always intended, after giving the firm all the time he could to recuperate from the panic and other losses and expenses, which was claimed as their delay to take up his stock. I was shown every letter and statement from the firm since 1905 and I am thoroughly conversant with the entire correspondence, which is all in the hands of Mr. O'Donnell.

The Case seems to me to be one of extreme technicality. Mr. O'Donnell seems to think I will win without a doubt. Mr. & Mrs. Waterman are probably among the best friends and greatest admirers that I have in the entire world, having lived at the Savoy all the time we did. He is a fine man and a fine Lawyer,—the Attorney for the Insurance Company. As you may know, several States have decided absolutely in favor of the Insured, disregarding entirely the physical possession of a policy. Texas is among these States and there are others. From you offering the policy to Louis, naturally the interpretation would be, you knew or thought it right to do so. You said after the stock should have been

taken up. He waited patiently—a dying man—for you to take it up with nothing of his own, dependant entirely upon a wife (who had some property and was willing to spend it for living expenses). Hoping and believing that each month would bring him a settlement at par for the stock, which he considered *too* low. He wanted to buy a small Ranch and live the remainder of his life in country air—more comfortably than could possibly be done in cities. You were perhaps advised not to take it up owing to the possession of the policy. You must always bear in mind that you first offered the policy. Louis intended to take up the subject with you later. You anticipated him in regard to this, which he wrote you.

To be more brief, this fact and the manner in which he considered his place in the firm given to others, while he was practically put out of it when he was well enough and anxious to come back and could have done it—for a time at least. All the others were, and still are, drawing salaries and making a good living, while he could not have lived at all, had he not had a wife willing to spend her own for him. [246]

This is the condition *sine quo non*, as Bankers, and Tradespeople and others with whom we dealt know. But, there always seems to be two sides to a question. Louis was the purest hearted man—outside of Heaven—you perhaps know it as well as I. If you will pardon a personality,—he thought you a good man. I also believe you are. The pity is that there could not have been a personal meeting and amicable settlement between you two old partners

and Brother-Masons. How much he deplored it, I will not attempt to tell you. I can only take up matters as he directed and wished, but I have a rather judicial mind and wish to be perfectly just and fair. I must remember "to be fair to my neighbor also means to be fair to myself," so quite on my own responsibility I shall make what I consider an entirely fair offer of settlement. More fair to you than to me, perhaps, in as much as I firmly believe I shall win the case, especially if I go to Colorado to be present during its progress. As before I ask you to bear in mind that *you* offered the policy; that I find I can sell the stock here above par, or to Honolulu parties who are guardians of very minor children, and who consider the firm a progressive one,—a person who is an old friend of my husband and had implicit faith in *you* and *him*. The later members of the firm, he does not know so well.

I will also state that the stock was transferred to me in 1906, and Louis would never after that have anything to do with it, save as I instructed, (this against my wishes). Any offer he made was practically my own, and always my suggestion. Since, there have been Lawyers fees, Funeral expenses, and a $5,000 mortgage on property, which must be settled before the first of May. *He* lies in the Crematory at Los Angeles until my own health and strength permits my going East—where a burial will be in the old Cemetery on the Ancestral Farm and a Monument erected. I have the stock here, and have been on the point of parting with it, but I preferred to compro-

mise the Insurance Case, and so it is still in my possession.

I will settle my claim to the Insurance Policy and deliver the stock for $7,500.00—this is half for you—half for me, of the Policy. As I said, please recall your offer of the policy; or, I will take $6,000 for the stock and let the Court decide as to the Policy. Should you decide to accept either offer, will you cable, and I will immediately send the stock through a Bank.

I do not wish to stay here longer than it will take to hear from you, but I *will* stay until you shall have had time to send a reply.

Answer immediately what you can do in regard to the stock, as I have an opportunity to sell here. I will hold it until your message is received.

Yours very truly,

(Sig.) EMMA F. RUMSEY. [247]

IX.

That the said Samuel L. Rumsey died in the city of Los Angeles, State of California, on the 27th day of July, 1910. That at the time of his death the said petitioner, Emma Forsyth Rumsey, was his lawful wife.

X.

That on the 15th day of August, 1910, said Emma Forsyth Rumsey presented to said respondent, New York Life Insurance Company, at its Home Office in the city of New York, proofs of the death of the said Samuel L. Rumsey. That said proofs of death were made out in full compliance with the rules and regulations of the said respondent, New

York Life Insurance Company, in said policy, with respect to proofs of death. The said proofs of death were made on forms furnished by said New York Life Insurance Company to said Emma Forsyth Rumsey on her application, at her request and for her accommodation, and in so furnishing said forms to her, said New York Life Insurance Company then and there advised her that a dispute existed in regard to the ownership of said policy and the right to the proceeds thereof, and that thereafter, in delivering said forms or blanks, said New York Life Insurance Company reserved all of its rights and gave no instructions in regard to the filing of claim, and the said New York Life Insurance Company then and there duly advised the said Emma Forsyth Rumsey that according to the records of said respondent, said policy provided for payment in the event of death, to respondent, Benson, Smith & Company, Limited, or its legal representatives, and that the beneficiary named therein had not been changed.

That the following is a true and correct copy of the proofs [248] of death and claim so presented by said Emma Forsyth Rumsey to said New York Life Insurance Company: [249]

PROOFS OF DEATH.

CLAIMANT'S STATEMENT No. 1.

(Before making out this Statement, read carefully the Special Instructions on the other side.)

1. No. of Policy—3,442,989. Date of Policy—June 11, 1903. Amount—$5,000.00.

2. Name of deceased in full—Samuel Lewis Rumsey.
3. Residence—a. When policy was issued—Honolulu, Island Oahu, Hawaii.
   b. At time of death—2197 W. 30th Los Angeles, Cal*a*fornia.
4. When was residence last changed? Nov. 4, 1909. 2197 W 30th Los Angeles, Ca*lf*.
5. Occupation—a. When policy was issued—Merchant, Honolulu, Hawaii.
   b. At time of death—No occupation.
6. Date of birth—Sept. 9th, 1854.
7. Place of birth—Near Goshen, N. Y.
8. State the source from which date of birth was obtained—From record in the family Bible. The deceased—his mother (Mrs. C. V. Rumsey, Weekawken, N. Y. Sister—Mrs. S. B. Rumsey Turner, N. Y.)

(Note.) The Family Record, Certificate of Birth or other writings should be referred to.

9. a. Place of death—2197 W 30th St., Los Angeles, Ca*lf*.
   b. Date of death—July 27, 1910.
10. Name and residence of every physician who attended deceased during the year prior to death—Dr. P. O. Hanford, Colorado Springs, Colo.; Dr. W. F. Perry, Hollingbrok Hotel, Los An*gl*es; Dr. Wm. T. Clark, 1777 West Jefferson St., Los An*gl*es.
11. In what other companies and for what amounts

was life of deceased insured? I know of no other insurance.

12. In what capacity, or by what title, do you claim this insurance? I am widow of deceased and beneficiary named [250] in change of beneficiary clause of policy forward to home office from Denver, Colo., July 10, 1907, receipt of which was acknowledged by letter to deceased July 19, 1907, and claim as such.

13. What was your age at your last birthday? 52.

Dated at Los An*gl*es, Ca*lf*., this 6 day of Aug., 1910.

Signature—EMMA FORSYTH RUMSEY,

Postoffice address, 2197 W. 30th St., Los An*gl*es, Ca*lf*. [251]

State of California,
County of Los Angeles,—ss.

I, H. R. Burnell, a Notary Public in and for said County, residing therein, duly commissioned and sworn, hereby certify that the erasures and interlines appearing in claimants statement No. 1, made by Emma Forsyth Rumsey, hereto attached, were made in my presence, and before she signed same.

(Signed) H. R. BURNELL,

Notary Public in and for the County of Los Angeles, State of California.

My commission expires Jan. 21, 1914.

State of California,
County of Los Angeles,—ss.

I, C. G. Keyes, clerk of the county of Los Angeles (and *ex officio* clerk of the Superior Court of the

State of California, in and for said county, the same being a court of record of the aforesaid county, having by law a seal), do hereby certify that H. R. Burnell whose name is subscribed to the attached certificate of acknowledgment, proof or affidavit, was at the time of taking said acknowledgment, proof or affidavit, a notary public —— duly commissioned and sworn and residing in said county, and was, as such, an officer of said State, duly authorized by the laws thereof to take and certify the same, as well as to take and certify the proof and acknowledgment of deeds and other instruments in writing to be recorded in said State, and that full faith and credit are and ought to be given to his official acts; and I further certify that I am well acquainted with his handwriting, and verily believe that the signature to the attached certificate is his genuine signature, and further that the annexed instrument is executed and acknowledged according to the laws of the State of California.

In witness whereof, I have hereunto set my hand and affixed my official seal this 8th day of August, 1910.

C. G. KEYES,

County Clerk and *ex officio* Clerk of the Superior Court of Los Angeles County, State of California. [252]

XI.

That said respondent, New York Life Insurance Company, has at all times refused and still refuses to pay to the said Emma Forsyth Rumsey the sum of Five Thousand Dollars ($5,000.00), being the

amount of said policy of insurance upon the life of the said Samuel L. Rumsey, or any part thereof, but said refusal was and is not upon the ground that proofs of death were not in due form. That no other or further proofs of death were ever furnished the said New York Life Insurance Company.

XII.

That on or about the 17th day of August, 1910, said respondent, New York Life Insurance Company, notified respondent, Benson, Smith & Company, Limited, in writing, that proofs of death of said Samuel L. Rumsey had been filed by the said Emma Forsyth Rumsey as aforesaid. That on or about the 3d day of September, 1910, the said respondent, Benson, Smith & Company, Limited, replied to said notification of said respondent of August 17th, 1910.

That the following are true and correct copies of said letters of August 17th 1910, and September 3, 1910: [253]

NEW YORK LIFE INSURANCE COMPANY,
346 & 348 Broadway, New York.
DARWIN P. KINSLEY, President.
DIVISION OF POLICY CLAIMS.

John C. McCall, Second Vice-President.
N. R. H. M.
Norman R. Haskell, Superintendent.

New York, Aug. 17th, 1910.

Messrs. Benson, Smith & Co. Ltd.
Honolulu, Hawaii, Sandwich Islands.

Gentlemen:

In re Pol. 3,442,989—Life of SAMUEL L. RUMSEY, Dec.

We have received at this office proofs of death of

Samuel L. Rumsey, which have been filed by Emma Forsyth Rumsey through her attorneys in this city, Messrs. Alexander & Green at 120 Broadway.

In the early part of 1907 Mr. Rumsey wrote to us directing us to change the beneficiary from your firm to Emma Forsythe Rumsey—the request was unaccompanied by the policy and we were subsequently informed that the policy was in Honolulu—that it was being unlawfully detained; therefore Emma Forsythe Rumsey claimed to be the beneficiary in accordance with the order filed by the insured.

We were also notified that Mrs. Rumsey, as a stockholder of Benson, Smith & Co. Ltd., had forbidden your corporation to pay any further premiums on this policy and that she had notified you that she claimed to be the beneficiary thereunder.

We do not know anything about the merits of the controversy which appears to have existed between your Company and Mr. Rumsey, but give you this statement of facts in order that you may advise us at once as to your relations to this policy contract. If you have any interest in this policy, and desire to make claim, the same may be filed on blank enclosed herewith.

Hoping that under the circumstances you will favor us with a prompt reply, we remain,

Yours very truly,

(S.) NORMAN R. HASKELL,

(E) Superintendent. [254]

PROOFS OF DEATH.

CLAIMANT'S STATEMENT No. 1

(Before making out this Statement, read carefully the Special Instructions on the opposite page)

1. No. of Policy: ———. Date of Policy: ———. Amount: $ ———.
2. Name of deceased in full: ———.
3. Residence—a. When policy was issued. a. ———. b. At time of death. b. ———.
4. When was residence last changed? ———.
5. Occupation—a. When policy was issued. a. ———. b. At time of death. b. ———.
6. Date of Birth: ———.
7. Place of birth: ———.
8. State the source from which date of birth was obtained? ———.

(Note.) The Family Record, Certificate of Birth or other writings should be referred to.

9. a. Place of death: a. ———. b. Date of death: b. ———.
10. Name and residence of every physician who attended deceased during the year prior to death: ———.
11. Do you make the written statements and affidavits of the physicians who attended or treated the insured a part of your proofs of death? ———.
12. In what other companies and for what amounts was life of deceased insured? ———.

13. In what capacity, or by what title, do you claim this insurance? ———.

14. What is the date of your birth? I was born on the ——— day of ———, 18——.

15. a. Do you wish to leave your insurance money or any part of it with the Company at interest in accordance with its plan for that purpose? a. ———.

b. If so, what part of it? b. ———.

Dated at ———, this —— day of ——, 19—.

Signature ———————————.

Postoffice Address ———————————.

State of ————,

County of ————,—ss.

On this —— day of ———, 19—, personally appeared before me the above-named ———, who subscribed the foregoing statement before me and made oath that the foregoing answers are each and all true.

[Official Seal] ———————————

———————————

This statement must be sworn to before an officer authorized by law to administer oaths. If sworn to before an officer not using an official seal, his authority and the genuineness of his signature must be attested by the proper Clerk under the seal of his office. [255]

Policy No.

PROOFS OF DEATH
Submitted to the
NEW YORK LIFE
INSURANCE COMPANY
346 & 348 Broadway, New York.
Statement No. 1

INSTRUCTIONS FOR PREPARING PROOFS OF DEATH.

No one need employ any person to help collect insurance from New York Life Insurance Company, nor need anyone incur any expense for this purpose except to pay the customary charges required to comply with these instructions. In ordinary cases the proofs of death required are as follows:

STATEMENT No. 1 must be made by the person or persons to whom the insurance is payable. If there is more than one beneficiary, all may join in one statement, or a separate blank will be furnished for each if desired.

When a Policy is payable to the legal representatives of the insured, the statement must be made by an executor or administrator, a certified copy of whose appointment and authority must be furnished.

When a Policy is payable to a named beneficiary of full age, the statement must be made by such beneficiary.

When a Policy is payable to a minor, the statement must be made by a guardian, a certified copy of whose appointment and authority must be furnished.

When a Policy has been assigned, the statement

must be made by the assignee, and must be accompanied by the original assignment, or a certified copy thereof. In the latter case, the original assignment must be surrendered with a Policy when the claim is paid.

When a Policy is payable to a named beneficiary, and by the death of that beneficiary has become otherwise payable, a statement, duly certified, must be furnished, giving the place and date of death of the deceased beneficiary.

When a Policy, or any part of it, is payable to "children" in general a sworn statement must be furnished, giving the names and dates of birth of all the children. If any have died, the statement must give the date of death, and must also state whether they died unmarried, intestate, and without issue.

STATEMENT No. 2 must be made by the physician in attendance during the last illness of the deceased, and must be entirely in his handwriting.

When a coroner's inquest has been held, a copy of the verdict, duly certified, must be furnished with this statement.

STATEMENT No. 3 must be made by a person of legal age, intimately acquainted with, but not related to, the deceased, who has seen the remains and is not interested in the insurance.

☞All of the statements must be sworn to before an officer authorized by law to administer oaths. If sworn to before an officer not using an official seal, his authority and the genuineness of his signature must be attested by the proper Clerk under the seal of his office.

☞Every question must be distinctly and fully answered. The Company reserves the right to require or to obtain further information should it be deemed necessary.

☞In cases out of the ordinary special instructions will be given when applied for.

Honolulu, T. H., September 3, 1910.

New York Life Insurance Company,
346 & 348 Broadway,
New York, N. Y.

Dear Sirs:

In reply to your letter of Aug. 17, 1910, in reference to Policy 3,442,989 on the life of Samuel L. Rumsey, deceased, we beg to reply that we have already, through your Honolulu representatives, made claim to the amount payable under said policy.

Referring to the claim made by Mrs. Rumsey, we may say that we are advised by our attorneys that our right to the amount payable under the policy is unquestionable.

It is true that on the 17th day of May of this year, we received from Mrs. Rumsey's attorneys (Messrs. O'Donnell & Graham, Denver, Colorado), a letter stating that as a stockholder, she did forbid us to pay any further premiums upon the policy. We disregarded this notice and paid the final premium. The policy was taken out for us, the premiums have all been paid by us, and the insurance was effected on account of our interest in Mr. Rumsey's life as an officer and stockholder in our company and also

in order to provide means to take up this stock in case of his death.

Further, this policy was one of a number all taken out by the company at the same time on the lives of the principal officers and stockholders of the company.

Mr. Rumsey, except as a stockholder in our company, never had any interest in the policy. Accordingly Mrs. Rumsey could not obtain any interest therein through him. According to the contract, no change of beneficiaries could be made except upon the policy itself; and no such change has been made as we have, at all times, retained the policy in our possession.

Very truly yours,
BENSON, SMITH & CO. [256]

XIII.

That on or about the 15th day of August, 1910, said Emma Forsyth Rumsey instituted a suit in assumpsit against said New York Life Insurance Company in the District Court of the City and County of Denver, State of Colorado, to recover from said respondent the proceeds of said policy of insurance upon the life of the said Samuel L. Rumsey, with interest thereon. That process of summons was duly served on said New York Life Insurance Company, defendant in said suit, and said respondent therein duly filed its answer to the complaint of the said Emma Forsyth Rumsey in said suit. That the said Emma Forsyth Rumsey, plaintiff in said suit, duly replied to the said answer of said New York

Life Insurance Company traversing and avoiding the allegations of said answer. That on the 15th day of January, 1913, said New York Life Insurance Company filed in said suit notice of tender to said Emma Forsyth Rumsey of the said sum of $232.30 and interest, together with receipt of the attorneys of said Emma Forsyth Rumsey for copy of same, and thereupon the Court in said cause duly made an order that the said sum recited as being tendered might be paid into court. That upon the issues joined as above stated, a trial was duly had in the said District Court of the city and county of Denver, State of Colorado, on, to wit: the 21st day of January, 1913, and at the conclusion of plaintiff's case, no evidence having been introduced on behalf of defendant New York Life Insurance Company, the Court duly sustained a motion made therein by said New York Life Insurance Company for a nonsuit. That the Court in said cause then and there upon the granting of said motion for nonsuit entered judgment dismissing the complaint of the said Emma Forsyth Rumsey in said cause and adjudging that the said New York Life [257] Insurance Company have and recover from the said Emma Forsyth Rumsey, the plaintiff in said cause, its costs. That thereafter the said Emma Forsyth Rumsey sued out a writ of error from the Supreme Court of the State of Colorado to the said District Court of the city and county of Denver, and said writ of error and the questions involved in said cause were duly submitted and argued in said Supreme Court. That thereupon the said Supreme Court of

the State of Colorado rendered its decision and opinion and entered judgment in said cause affirming the said judgment of the said District Court of the city and county of Denver.

That the following are true and correct copies of the complaint, summons and answer in said suit so instituted in said District Court of the city and county of Denver, State of Colorado.

That among other things, the said Supreme Court of the State of Colorado, in its decision and opinion upon said writ of error, held and said:

> "If we understand plaintiff's counsel correctly, they urge three reasons why a nonsuit should not have been granted:
>
> First, because the evidence establishes that a change of beneficiary had been made substantially as the policy requires. An insurance policy, like any other written instrument, is to be considered as a whole. The parts concerning the change of beneficiary must be likewise thus considered. *That portion which provides that no change shall take effect until indorsed on the policy by the company at the home office is entitled to the same consideration as any other portion pertaining to such change. It stands admitted that no change of beneficiary was ever indorsed on this policy by the company at the home office, or elsewhere, and that it was never presented to the company at its home office, or elsewhere, for this purpose.* [258] It therefore follows that there had not been a change of

beneficiary perfected and fully completed in the manner provided by the policy.

Second, it is claimed that a change of beneficiary had been made as provided in the policy with the exception of its indorsement on the policy at the home office; that this requirement is solely for the protection of the company; that the company has waived it; hence, no former beneficiary or other person has any right to complain. Defendant's counsel challenge the correctness of the assumption that the clause in the policy providing that no change of beneficiary shall take effect until indorsed on the policy by the company at the home office is inserted solely for the protection of the company, or that it can waive it without the consent of the then designated beneficiary, so as to effect the right of such beneficiary. They call our attention to the opinions of this court in John Son v. New York Life Co., 56 Colo. 178, 138 Pac. 414; Finnell v. Franklin, 55 Colo. 156, 134 Pac. 122; and Rollins v. McHatton, 16 Colo. 203, 27 Pac. 254, 25 Am. St. Rep. 260, in which they claim it is held in substance, that the beneficiary of an insurance policy which allows a change of beneficiary has a contingent vested right in the policy, which is subject to be divested only in accordance with the provisions of the contract, for which reason, they urge, it being admitted that no indorsement of such change was ever made upon the policy, that even though it were held that the company had waived this provision, it would avail nothing as

against the rights of the original beneficiary. They contend further that the proof does not sustain the assumption that the company ever waived this provision. If correct in their second contention, it is unnecessary to consider the first.

The evidence concerning the change of beneficiary and the alleged waiver by the company consist of the written instrument calling for the change and certain correspondence between counsel for the plaintiff, who was also counsel for the insured and the insurance company. This correspondence extended over a period of about three years. It would accomplish no good purpose to insert it in an opinion. A careful study of it leads to no other conclusion than that it fails to disclose any waiver by the company, but, to the contrary, it discloses that the company at all times insisted that this requirement be complied with. If the question of waiver involved the keeping of the policy alive upon account of the alleged tender and receipt by the company of the payment of one premium by counsel, it would then present an entirely different aspect, and a large number of cases cited by plaintiff would be in point.

The third reason urged why the non suit was wrong seeks to invoke the equitable rule of substitution. The difficulty with counsel's position in this respect is not in the rule which is generally recognized and frequently applied, but in its application under the record as here presented. It is [259] urged that the insured

in good faith attempted to secure the policy in order to have the change of beneficiary indorsed as provided therein, but was wrongfully denied possession by Benson, Smith & Co., and thereby prevented from so doing by circumstances over which he had no control, for which reason equity should step in and treat the substitution as complete. To sustain this contention, we would have to hold that the policy had been wrongfully withheld from the insured by Benson, Smith & Co., and for that reason the substitution should be treated as complete. This includes a finding that in equity Benson, Smith & Co. had ceased to be the beneficiary, and this without their being made a party to the action. It stands admitted by the pleadings that the policy is in their possession, and that they were and are designated in it as the beneficiary. Under such circumstances, we do not think that their equities in the matter, and their right as a beneficiary, can be determined under the equitable rule of substitution in an action to which they are not a party.

* * * *It follows that the presence of Benson, Smith & Co. is essential to the protection of the insurance company. The plaintiff did not make them a party, and when the question was properly presented by answer she did not then ask that they be brought in as provided by the Code. The court did not, of its own motion, make such an order, evidently for the reason, which appears to be conceded, that they were residents of Honolulu, and jurisdiction over them could not be se-*

cured except by their consent, and there is nothing to disclose that the plaintiff sought to secure it; but the fact of their being nonresidents does not change the rule."

That Exhibit "C" attached to the amended bill of complaint of the petitioner, Emma Forsyth Rumsey, in the above-entitled cause, is a true and correct copy of the decision and opinion of said Supreme Court of the State of Colorado on said writ of error and of the dissenting opinion therein.

That said decision and opinion of said Supreme Court of the State of Colorado and said dissenting opinion are found fully reported in the case of *Rumsey vs. New York Life Insurance Company, 147 Pacific, 337, 343.* [260]

State of Colorado,
City and County of Denver,—ss.

In the District Court.

EMMA FORSYTH RUMSEY,

Plaintiff,

versus.

NEW YORK LIFE INSURANCE COMPANY, a Corporation,

Defendant.

Complaint.

The plaintiff complains of the defendant and for cause of action alleges:

That the defendant, the New York Life Insurance Company is a corporation incorporated under the

laws of the State of New York for the purpose of insuring the lives of individuals, and at all the times hereinafter mentioned, was, and now is, engaged in the business of life insurance.

That on, to wit, the eleventh day of June, A. D. 1903, the said defendant issued its certain policy of insurance, Number, 3,442,989, upon the life of Samuel L. Rumsey, therein designated as the Insured, wherein and whereby it agreed to pay five thousand ($5,000.00) dollars to a certain beneficiary therein named, or such beneficiary as may have been duly designated at the Home Office of the Company in the City of New York, immediately upon receipt and approval of Proofs of the Death of said Samuel L. Rumsey. And in said policy it was and is provided as follows, to wit:

> "CHANGE OF BENEFICIARY: The insured having reserved the right, may change the beneficiary, or beneficiaries, at any time during the continuance of this policy, by written notice to the Company at the Home Office, provided this policy is not then assigned."

That on the date next hereinafter mentioned, the plaintiff was the lawful wife of said Samuel L. Rumsey. That on, to wit, about the tenth day of June, 1907, the said Policy not being then assigned the said Samuel L. Rumsey did, in pursuance of the right to him so as aforesaid reserved, change the beneficiary of said policy of insurance, by written notice to the Company at its Home Office, and by such change and notice did designate, appoint and make the plaintiff beneficiary of said policy.

That afterwards and on, to wit, the eleventh day of June, A. D. 1910, the defendant Insurance Company did accept and receive from the plaintiff, as beneficiary under said policy, the annual premium of two hundred thirty-two dollars and thirty cents ($232.30), then due and payable upon said policy. [261]

That said Samuel L. Rumsey departed this life at Los Angeles, State of California, on, to wit, the 27th day of July, 1910.

That the plaintiff presented to the defendant insurance company, at its Home Office in the city of New York, Proofs of Death of him, the said Samuel L. Rumsey, on the 15th day of August, A. D. 1910. That the said Proofs of Death were made out in full compliance with the rules and regulations of the said company, and the said policy, with respect to Proofs of Death, and upon blanks furnished by said company for that purpose, and thereupon, the plaintiff became entitled to have the said Proofs of Death approved, and to the payment of the said sum of five thousand dollars, but, nevertheless, the said company refuses to pay the said sum of five thousand dollars, but such refusal was not upon the ground that said proofs were not sufficient or not such as should be approved by said company.

WHEREFORE, plaintiff prays judgment against the said defendant, New York Life Insurance Company for the sum of five thousand ($5,000.00) dollars, with interest thereon at eight per cent (8%) per annum from the fifteenth day of August, A. D. 1910, to the date of judgment.

For all other proper relief and the costs of this action.

(Signed) T. J. O'DONNELL,
(Signed) J. W. GRAHAM,
Attorneys for Plaintiff. [262]

State of Colorado,
City and County of Denver,—ss.

T. J. O'Donnell, being first duly sworn on oath, deposes and says:

That he is one of the attorneys for the plaintiff in this action.

That he has read the foregoing complaint and knows the contents thereof and that the matters and things therein stated are true of his own knowledge, except as to those matters therein stated to be on information and belief, and as to those matters, he believes them to be true.

That the reason this verification is not made by the plaintiff in person is that the plaintiff is not within the State of Colorado, and is absent from the City and County of Denver, where this deponent resides.

(Signed) T. J. O'DONNELL.

Sworn and subscribed to before me this 15th day of August, A. D. 1910.

(Signed) WILLIAM B. RODDY,
Notary Public.

My commission expires March 25th, 1912. [263]

State of Colorado,
City and County of Denver,—ss.

In the District Court.

EMMA FORSYTH RUMSEY,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a Corporation,

Defendant.

Summons.

The People of the State of Colorado, to the Defendant Above named, GREETING:

You are hereby required to appear in an action brought against you by the above-named plaintiff, in the District Court of the City and County of Denver, State of Colorado, and answer the complaint therein within twenty days after the service hereof, if you are served within this County; if served out of this County, or by publication, within thirty days after service hereof exclusive of the day of service; or judgment by default will be taken against you according to the prayer of the complaint.

If a copy of the complaint be not served upon you herewith, or if service hereof be made out of the State of Colorado, ten days additional time to that above specified shall be allowed for your appearance and answer in said action. This is an action brought to recover judgment against the defendant, The New York Life Insurance Co., for the sum of $5,000.00

with interest thereon at the rate of 8% per annum from the 15th day of August 1910, upon a certain policy of insurance numbered 3,442,989; and for other and further relief as will more fully appear in the complaint on file herein, a copy of which is hereto attached.

WITNESS, Perry A. Clay, Clerk of said court, with the seal thereof hereunto affixed, at office, in the City of Denver, this 15th day of August, A. D. 1910.

[Seal] (Signed) PERRY A. CLAY,
Clerk.
By H. W. Proutz,
Deputy Clerk. [264]

State of Colorado,
City and County of Denver,—ss.

In the District Court.

No. 49418.

EMMA FORSYTH RUMSEY,
Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a Corporation,
Defendant.

Answer.

Comes now the defendant, and for answer to the plaintiff's complaint says:

This defendant admits that it is a corporation, organized and existing under the laws of the State of New York for the purpose of insuring the lives of individuals, and that at all the times mentioned in the

complaint was, and still is, engaged in the business of life insurance.

Admits that during the month of July, A. D. 1903, this defendant issued a certain policy of insurance, numbered 2442980, upon the life of Samuel L. Rumsey, therein designated as the insured, wherein and whereby it insured the life of said Samuel L. Rumsey in the sum of Five Thousand Dollars ($5,000.00) in favor of the certain benefiicary in said policy of insurance specified, to wit, Benson, Smith and Company, Limited.

Admits that on the 10th day of June, 1907, the plaintiff was the lawful wife of said Samuel L. Rumsey. Admits that the plaintiff presented at the Home Office of this defendant, at the City of New York, alleged proofs of death of the said Samuel L. Rumsey on or about the 15th day of August, A. D. 1910.

Defendant denies each and every allegation, and each and every part of every allegation, in the complaint contained, not hereinefore in this answer expressly admitted.

FOR A SECOND AND FURTHER DEFENSE to plaintiff's complaint, this defendant alleges:

That on the 11th day of June, A. D. 1903, and for some time prior thereto, Benson, Smith and Company, Limited, (hereinafter called the "BENSON COMPANY") was, ever since has been, and still is, a corporation; that on the day last mentioned, and for some time thereafter the said Samuel L. Rumsey was the Treasurer of and a stockholder in the Benson Company; George W. Smith was, ever since has

been, and still is, the President of and a stockholder in the Benson Company; and Alexis J. Gignoux was the Secretary of and a stockholder in the Benson Company, and that the said Gignoux for some time thereafter remained the Secretary of the Benson Company, and was such Secretary until he was elected the Vice-president of the Benson Company; that during all of said times the said Gignoux has been a stockholder in and is now the Vice-president of [265] Benson Company; that on the 11th day of June, A. D. 1903, the said Smith, the said Rumsey and the said Gignoux each made application to the defendant, for insurance, in the sum of Five Thousand Dollars ($5,000.00) each, upon their respective lives, for the use and benefit of the Benson Company and for the protection of the interest of the Benson Company in their respective lives as officers and stockholders of the Benson Company; that thereafter, and based upon said several applications for insurance, this defendant issued and delivered a policy of insurance upon the life of each of said three last named persons respectively, each policy for the sum of Five Thousand Dollars ($5,000.00) in each of which policies the Benson Company was and still is designated and specified as the beneficiary thereof; which said policies were respectively numbered as follows, to wit; George W. Smith, 3442990; Samuel L. Rumsey, 3442989; Alexis J. Gignoux, 3443579. That the Benson Company paid the Initial premium upon each of said policies, and has paid each and every annual premium upon each of said policies annually ever since, and as the same became due and payable.

That the annual premium upon the said policy so issued as aforesaid upon the life of the said Samuel L. Rumsey was and is the sum of Two Hundred Thirty-two Dollars and Thirty Cents ($232.30), and the Benson Company has paid each and every annual premium, including the initial premium, on said policy of insurance last mentioned, until the present time, as the same became due and payable.

That it is provided in and by said policy of insurance last mentioned that no designation or change of beneficiary shall take effect until endorsed thereon by this defendant at its Home Office.

That the said policy of insurance so issued by this defendant upon the life of the said Samuel L. Rumsey was and is in the words and figures as follows, to wit:

(Copy of Policy Inserted.)

That the said policy of insurance so issued as aforesaid upon the life of the said Samuel L. Rumsey has been ever since its issuance, and still is, claimed and owned by, and within the actual possession of, the Benson Company.

That no changes of the beneficiary named and designated in said policy of insurance last mentioned has ever at any time been made or endorsed upon said policy of insurance last mentioned by this defendant at its Home Office or elsewhere, and the Benson Company still remains the specified and designated beneficiary under said policy last mentioned. That the Benson Company has paid to this defendant each and every premium upon said policy last mentioned in the amount therein specified, annually, at or before the

time required by said policy of insurance; and neither the said Samuel L. Rumsey nor the plaintiff has ever at any time paid any premium, or any part of any premium, for or on account of said policy of insurance upon the life of the said Samuel L. Rumsey.

That the principal place of business of the Benson Company is at Honolulu, in the Territory of Hawaii, where the said Samuel L. Rumsey resided at the time of the issuance of the said policy of insurance upon his life, and that the Benson Company never has at any time transacted any business within the State of Colorado, and has not, and never has had since the commencement of this suit, any [266] officer, stockholder, officer or agent within the territorial limits of the State of Colorado. That the Benson Company claims and maintains that it is now, and at all times has been, the designated beneficiary in the said policy of insurance upon the life of the said Samuel L. Rumsey, and claims to be the owner of the proceeds of said policy and of the policy itself, and threatens to commence suit at Honolulu, in the said Territory of Hawaii, against this defendant to recover the contents of the said policy of insurance so issued as aforesaid upon the life of the said Samuel L. Rumsey, and refuses to interplead in this cause.

That the said policy of insurance upon the life of the said Samuel L. Rumsey, hereinbefore in this answer set forth at length, is the only policy of insurance ever at any time issued by this defendant upon the life of the said Samuel L. Rumsey.

That the said policy of insurance last mentioned, and hereinbefore in this defense set forth at length,

has never at any time since its issuance been tendered or presented to this defendant at any place by any person or persons, with a request or demand for a change of the beneficiary therein named, to wit, the Benson Company.

That on or about the 11th day of June, A. D. 1910, T. J. O'Donnell, Esquire, one of the plaintiff's attorneys, tendered to this defendant at its local office in the city and county of Denver, in the State of Colorado, for and on behalf of the said Samuel L. Rumsey, and the plaintiff, the sum of Two Hundred Thirty-two Dollars and Thirty Cents ($232.30), as and for the premium upon the said policy of insurance last mentioned, due and payable on the 11th day of June, A. D. 1910, and the said tender of Two Hundred Thirty-two Dollars and Thirty Cents ($232.30) so made was received by the agent of this defendant at its said local office conditionally, and upon the conditions set forth in a certain receipt then and there issued to the said T. J. O'Donnell, which said receipt was and is in the words and figures as follows, to wit:

> "RECEIVED from T. J. O'Donnell $232.30 for his acco*mo*dation and at his request, with the understanding that I am to forward it for him to the Home Office of the New York Life Insurance Company, where the record is kept of Policy No. 3442989; that neither I nor the office of said Company with which I am connected, have any record or knowledge of said policy, or authority to collect a premium upon it, or otherwise to take any action of any kind about it.

Executed in duplicate at Denver, Colo., this 11th day of June, 1910.

A. R. FLEMING.

The terms of the above receipt assented to.

T. J. O'DONNELL."

That the premium on the said policy of insurance last mentioned, due and payable on the 11th day of June, A. D. 1910, was paid to the Honolulu branch office of this defendant on the 9th day of June, A. D. 1910, by the Benson Company, which fact was not known by this defendant at its Home Office in the city of New York, nor by any of its officers or agents in said branch office at Denver or in said Home Office, on the 11th day of June, A. D. 1910, nor for a long [267] time thereafter. That in due course the said sum of Two Hundred Thirty-two Dollars and Thirty Cents ($232.30), so tendered by the said T. J. O'Donnell, was transmitted by the branch office of this defendant at Denver, Colorado, to this defendant's Home Office in the City of New York, and thereafter, and on the 29th day of August, A. D. 1910, this defendant, at the office of the plaintiff's attorneys in the city and county of Denver, in the State of Colorado, tendered back, unconditionally, to the said T. J. O'Donnell and John W. Graham, plaintiff's attorneys, the said sum of Two Hundred Thirty-two Dollars and Thirty Cents ($232.30) in lawful money of the United States, and the further sum of Four Dollars and Five Cents ($4.05) in lawful money of the United States, the interest accrued upon said sum of Two Hundred Thirty-two Dollars and Thirty

Cents ($232.30) between the said 11th day of June, A. D. 1910, and the day of said tender, to wit, the 29th day of August, A. D. 1910; that the said tender so made on the 29th day of August, 1910, was by the plaintiff and her said attorneys refused. That the said sum of money so tendered as aforesaid still remains in the hands of this defendant as the property of the plaintiff and subject to the plaintiff's orders, and this defendant hereby offers to pay the same into court at any time the Court may so require, for the use and benefit of plaintiff.

That each of the two said policies issued as aforesaid by this defendant upon the lives of the said Smith and Gignoux respectively, contained the same identical provision relative to a change of the beneficiary therein designated as was and is contained in the said policy of insurance so issued as aforesaid upon the life of the said Samuel L. Rumsey, and that the designated beneficiary in each of the said two last mentioned policies was and is the Benson Company, and no change of the said designated beneficiary has been made at any time in either of the said two policies of insurance last mentioned, and the Benson Company still remains the specified and designated beneficiary in said two last mentioned policies of insurance.

That the said two policies of insurance upon the lives of the said Smith and the said Gignoux respectively are still in full force and effect, and have been at all times since their issuance as aforesaid, and still are, in the possession of the Benson Company.

WHEREFORE, THIS DEFENDANT having fully answered the plaintiff's complaint, prays to be hence dismissed with judgment for its costs.

CHARLES W. WATERMAN,
Attorney for Defendant. [268]

State of New York,
City and County of New York,—ss.

John C. McCall, of lawful age, being first duly sworn, on oath doth depose and say; That he is an officer of the defendant, New York Life Insurance Company, to wit, the Second Vice-president thereof; that he has read the foregoing answer, knows the contents thereof; and that the facts therein set forth are true to the best knowledge and belief of this affiant.

JOHN C. McCALL.

Subscribed and sworn to before me, this 21st day of December, A. D. 1910.

_____,
Notary Public.

My commission expires ———.
(W:S:12:22:10) [269]

XIV.

That considerable correspondence passed between the said Emma Forsyth Rumsey, her attorneys, O'Donnell and Graham, and Benson, Smith and Company, Limited, relative to the claims of Mrs. Rumsey and Benson, Smith and Company, Limited, which is shown by letters between said parties attached to this stipulation and other evidence hereto attached.

That Messrs. Holmes, Stanley & Olson, attorneys for said respondent, Benson, Smith and Company,

Limited, on the 31st day of January, 1912, forwarded to the said Emma Forsyth Rumsey, then Emma Forsyth Creary, the following communication in writing. [270]

HOLMES, STANLEY & OLSON,
Attorneys at Law.

Honolulu, Hawaii, Jan. 31, 1912.

Mrs. Emma Forsythe Creary,
c/o First National Bank,
San Francisco, Cal.

Dear Madam:—

Mr. George W. Smith, of Benson, Smith & Company, Limited, Honolulu, has referred to us your letter under date of January 22nd, 1912, addressed to him, with instructions to reply thereto.

In the first place, no proposal for compromise could be entertained unless the same were made through your attorneys who have been and still are acting for you. In the second place, Messrs. Benson, Smith & Company, Limited, are advised that they are, without doubt, entitled to the moneys payable in respect of the insurance policy on the life of your late husband, Mr. Rumsey, and, therefore, do not care to enter into a compromise.

In so far as the consideration of expense is concerned, this does not affect our client as it is not a party to the Colorado suit.

Very truly yours,
(S.) HOLMES, STANLEY & OLSON.

CHO/N. [271]

XV.

That the following are true and correct copies of

letters, etc., duly forwarded and received by the respective senders, addressees and recipients, as by said letters, etc., indicated, bearing upon and relating to the matter of notification by the said New York Life Insurance Company to the said Benson, Smith & Company, Limited, etc., and bearing upon and relating to the matters in controversy in the above-entitled cause. That all of said letters, etc., may be considered by the Court to be in evidence [272] in the above-entitled cause in so far as the same, or any part or portion thereof, may be material to the issues in the cause or relevant thereto. [273]

BENSON, SMITH & CO., LTD.
Druggists.
Honolulu, T. H., March 8th, 1904.

My dear Rumsey:—

Your cable of the 18th of February, stating that you were convalescent in Hospital, reached us the date of sending and, to say the least, caused us all much uneasiness. It would appear from this that the fatigue of the trip had been overmuch for you and that you had to give up temporarily.

I trust that it was nothing more than this and that by this time you have recovered and are able to be about again.

I shall look, with some anxiety, for the arrival of the "Sierra" tomorrow in the hope of having a letter, with details, from you.

I have daily inquiries from friends but, unfortunately, am not able to give them any information.

From the papers you will learn of the financial difficulties with the Government and the consequent

effect on business. This condition has been coming for some time and one object I had in view in calling on the Governor was, if possible, to avert the matter before it became too acute. Carter has very much disappointed his best friends and there is great danger of his administration going out under a cloud.

The local effect will be to close up a number of the smaller concerns that are trying to do business on too small capital and, in the end, it will be of benefit to the business community. The fact is that the country has been living on an extravagant credit too many years. A reaction and restoration to a healthy basis is absolutely necessary. By the next mail I shall send you copies of all the papers relating to the closing of the business in order that you may be fully posted as to how matters are moving.

Your draft on L/C was presented yesterday and at once taken up. As this bore the same date as your Cable it may be considered as the latest news from you. The amount, with Exchange and Commission was $201.60, which has been duly debited to your account.

While business so far this year does not come up to the same period of last year, yet, we are doing the largest part of it and our competitors are complaining very bitterly.

The continued low price of Sugar is causing the plantation men to cut down in every particular and, to some extent, they are going to extremes. A reaction is bound to follow.

All join in kind regards.

Yours very truly,

GEO. W. SMITH. [274]

BENSON, SMITH & CO., LTD.

Druggists.

Honolulu, T. H., March 13th, 1904.

My dear Rumsey:—

Our anxiety was greatly relieved by the receipt yesterday, the 12th, per "Doric," of your letter of the 1/2nd, of March. We had begun to seriously think of sending a cable to some of the brethern in Phoenix, to inquire after you.

That reminds me that you have failed to give me the names, with initials, of any of the officers of the Commandry or Lodge in Phoenix. It would be a good thing to have them if required.

You must have a very hard and dreary time while in the Hospital. It is bad enough to be ill where you are known but to be among entire strangers it is harder. However, it is good to know that you are on the mend and expect soon to get out into the country.

We are still having our southerly weather with rain. It is the longest spell of oppressive, wet, disagreeable weather that I remember since I have been here.

From the newspapers you will learn that we are having something else to amuse, or distract, us here besides the weather.

The condition of the Treasury, the Bank, and business in general keeps our minds fully occupied. Political heads are falling and, as is usual in hard

times, the embezzler and forger are in much evidence.

In regard to the "Advertiser." I distinctly told Dekum to mail it to your address from the *17th day of January* until further orders. I am sending you the numbers wanted, by this mail.

You will see in the paper of tomorrow, the 14th, that the Supreme Court has handed down a decision in favor of the Merchants Association in the matter of Tax Assessments. The point is that we can deduct, on our returns, a reasonable amount from inventory value, to bring to actual cash value, for taxation purposes.

Our deduction is 20% and it makes a difference to us of $140.00 in taxes. This I consider one of the most important things that the Merchants Ass. has done.

I saw Bishop Restarick last evening and explained to him why he had not heard from you. He told me that he had written you a long letter.

I expect to see Dr. Wood tomorrow and will ask him definitely in regard to Elastic Hose. Card will be enclosed if necessary.

Under this cover I shall enclose all of the papers in regard to the closing of the business. I have made, personally, copies of the documents, together with all the information possible, in order that you may be fully posted. I do not know that I can add anything to my report. It was a great disappointment to me, that there should have been no profit shown. I had followed the figures all through the year and had worked out a profit. The fact is that,

either there was an error in the inventory of *1902* or something was missed in the inventory 1903. This latter is less possible from the fact [275] that every entry, price, extension and footing has been gone over four times, by myself first and then by the Auditors. The error, if any, lies back in 1902, and it will show up as a profit at the end of the present year. It is not a loss, of capital, or a retrogression of business. It simply wipes off the balance of profit, that we had left on the Profit & Loss A/C.

I shall await with interest your comments on the papers and any suggestions that you may have to offer.

Under this cover I also enclose Certificates of stock, representing McGonagles interest, for your signature. As the object of the increase in Capital Stock is to get *new capital* into the business, I am carefully investigating several parties to that end.

All of the staff join in kind regards and best wishes with the hope that the next mail may bring us news of a marked improvement in your condition.

With kind regards believe, me,

Yours very truly,

GEO. W. SMITH.

Monday, 14th, 9:30 P. M.

This will go by the "Coptic" tonight.

The Henry Waterhouse Trust Co. sold out today to a syndicate composed of Bishop & Co., B. Cartwright, A. J. Campbell, and W. R. Castle.

This is the biggest sensation of the year. Look out

for something to drop in Olaa next. I have not enough information to base a statement on as yet.

G. W. S. [276]

Exhibit "E."

PRIVATE OFFICE SAVOY HOTEL.

Denver, Colo., Sept. 19, 1905.

Dear George:—

I enclose paper corrected of "Romance and Fiction" which the papers here in spite of protest will fabricate out of whole cloth, two others without my knowledge and consent did even better.

Dr. Wood and Mc both met my wife, I would have advised you sooner if it were possible.

I am not a romancer as you know and at the time of my life and that of my wife it would hardly be proper proceeding I find it best to be as it is. The notice was left by me to be written by my wifes friend and the irrepressible reporter did the rest. The friends present were Southern acquaintances here of Mrs. R.

Bro Kincaid was my Personal friend. You may remember he visited the Islands some three years ago, Brush Denver Rubber Co.

We my wife and I have been constant companions since last winter at The Springs. My wife knowing my physical and financial Con (a widow) was willing to become my life partner and is a woman of character rather than beauty and practically my own age.

My future I have not outlined as yet. Your last letter to my regret gave me no outline of my Posi-

tion and I regret to feel You did not feel free to define my standing. I understand perfectly the position of V. P. under our by laws we never having an active one until my election. I certainly did not expect Fisher or Kennedy would assume the active nor did I think you intended. Now it is different and that is just what I wrote you about; to me it is a shelving because of the difference in matters. When you wrote me last fall of a prospective change you did not clearly define it and its receipt was too late for my reply before it had taken place, so I could not even suggest. I might have suggested McGill as asst Treas for instance as other Corp's have. He was young in the firm. (I have nothing absolutely against him and then it was Temporary as you said and I could still become V. P. and T. I left everything to you, and have absolute confidence in you, as all my acts demo*nt*rate throughout our entire bus relations; and I am not to be taken or understood as critical at this time, always loyal for better, as heretofore, for worse as thro our firm trials recently;—I also t*hr*oughly understand the rights of the other members, that should be understood by my attitude throughout—I cannot afford to return to find out my position only but *everything* involved and for my future, and I think it may be adjusted, meanwhile, it is not so complicated; I have nothing against Dumon but do not like too much his influence and was willing two years ago to avoid it if you recall.

Dr. Wood has doubtless ere this advised you of my condition as he found me at my request. I did not expect to be compelled to remain away so long

when I left but have been guided by the best advise and my judgment. [277]

I will say all your letters will have notice from me.

I would like to have visited my own people this season but was advised against it Temporary employment in drug bus retail here I tried but it was contra indicated—other positions I have failed to obtain.

I would like my masonic receipts for year forwarded as I requested some time ago also my list and pocket cast of Trit &c as we stock.

The matter of contribution to Cathedral I will attend to. The Churchman I will pay and discontinue —Your last letter of inclosures contained bill of yours which I ret—I will write you something of interest I hope in the future; I have just ret from two weeks in the Mountains, Mc was so short a time here that I had no time with him and hardly realize his visit. My wife and myself join in Kindest Wishes to You and Yours—and with regards to The Staff and employees and all my friends I am

Very Sincerely Yours,

S. L. RUMSEY.

(Certified.) [278]

BENSON, SMITH & CO., LTD.

Druggists.

Honolulu, T. H., Oct. 6th, 1905.

Dear Rumsey:—

I have your letter of the 19th, of September. Your last previous date was the 11th of June. I take up the subject seratim.

The first subject is your marriage of which I am

now first regularly advised. I extend to you my congratulations and wish you happiness. Your cablegram of the 31st, of August came duly to hand and I confess to a great surprise at the announcement. McGonagle had told me that you had introduced him to a lady with the information that you were betrothed and Dr. Wood brought me the same. Dr. Wood stated that you had told him that you had written me to that effect. I do not admit that you did so. From your letter of the 11th, of June I quote the following:

> "I desire and intend to marry, which was my hope four years ago, and you are aware then and before, if you recollect why I did not for I have told you, this matter is strictly between ourselves *sub rosa* at present."

If this was a notice to me you intended marriage in Colorado, or in the near future, I failed to so read it then and I fail to so read it now. I do not consider that it *was* a notification to me nor do I recollect that you intended marriage four years ago.

In a matter of this kind an outsider has no right to interfere, it is each mans own privilege and his own right to judge for himself.

In his relations, however, to his business associates it is customary and expected that he will give definite information. I was so advised in regard to Gignoux and would so expect to be advised by any other that I should select to be associated with me in business. When I admitted you into this business no such occurrence had arisen. In the present instance, however, I should have been fully advised.

The acts injects a contingency into the business that, in *fi*ew of the condition of your health and the possibility of your inability for business or death, that will complicate matters and I was entitled to a consultation in the matter and a statement of the anticipated time and whatever arrangements might be proposed for your estate.

Your failure to advise me has, in my opinion, been a dereliction of duty toward me.

I am now entitled to know what change, if any, you may make in the disposition of your property that is directly connected with this business.

I note that you feel that I failed to define to your satisfaction your position in the firm in the event of your return. A careful review of the copy of my reply leads me to think that I did do so as I then explained, as far as it was possible under the circumstances.

The office that you at present hold is that of Vice-President. As long as the occupant is inactive in the business, naturally, the office is inactive except in the absence or death of the President. What your position would be in the possible event of your return would be determined by the circumstances at the time. Whether by [279] the elimination of an employe, which is probable, room being thereby made in the activities of the business for the one who would return, or by readjustment of the employes, would be determined at the time.

That is all that can or could be stated at the present time. The compensation to be allowed would be determined by the condition of the business and the

relation of the expense account to the volume of trade.

When I wrote you in the fall of 1904 of a prospective change I did say that it was temporary at the time, with expectations that you would return in 1905. This, however, was impossible and the change became a permanent one with McGill as incumbent.

The office of Assistant Treasurer is an anomaly in a Corporation doing a business of less than half a million a year.

Article III of our By-Laws provides as follows:

> "Any stockholder may be elected to hold two offices except those of President and Treasurer, *Vice-President and Treasurer* or Treasurer and Auditor."

Before selecting McGill for this office I required that he become a Stockholder. This he did. The excellent and able work that he has accomplished in the financial department of the business, in the past year, in the reduction of indebtedness and liabilities and the handling of accounts is better than anything that we have heretofore had and has fully justified my choice, and, at the annual meeting in January, he will be re-elected to the position that he now holds.

The choice of officers and the offices that they are to hold, in the last analysis, lies entirely with me. My acts in the business are for the protection and advancement of all interests. Of the efficiency and adaptability of one or another, for this position or that, I am the sole judge of.

You have several times referred to your loyalty. This I have never doubted, but, let me remind you,

that this attribute has also existed on this side at all times and at a critical time and that it also exists with the other members of this corporation.

You have also referred to our "allied interests." Aside from the association in the business, or personal or fraternal relations, I take this to refer to the hypothecation of stock as a joint collateral. In this you did no more than I had done for some time previous at a personal expense and what you did was what I would require of anyone actively associated with me in the business. A refusal to so share responsibility I would consider sufficient justification for a retirement from the business of the one refusing.

Dr. WOOD. I have had from the Doctor a description of your condition, as he found it, and which he has repeated to me today.

He states that the upper lobe of your right lung is entirely consolidated, out of commission. That you continue to have some temperature, that the pulse rate is somewhat above normal and that the Tubercle Bacilli are still present. He said, further, that as long as any Bacilli were present it would be suicidal for you to return to this humid climate. That they would at once multiply. [280]

Masonic Receipts are enclosed herewith. I cannot find that you have asked for them before but I recognize that they are necessary in travelling.

WYEYTHS LISTS did not appear until August 1st, owing to the delay in the publication of the Pharmacopoeia. We have only received a few by mail and I sand you one, also a TRITURATE CASE.

McGONAGLE. I cabled you that McG., would be in Denver on Aug. 8th, at the Hotel Metropole. He tells me that he arrived there early in the morning and then waited around the Metropole until eleven o'clock without anything seeking him, as he had a right to expect, and finally found you through the medium of the cable office.

I note you say that you will return in the spring and "relieve me." Your thought is a kindly one but, if I should desire to take a trip, I would have no hesitation in leaving the business in the hands of Gignoux, McGill and McGonagle. They are perfectly competent to carry it on for a period. I shall not leave here until the fall of *1907* or spring of *1908*. I have had a vacation this year, having spent some time at the Volcanoe and in Hilo, a trip that I very much enjoyed.

TUCKER is now in San Francisco and will travel on to Washington stopping at Denver either to or from that city.

H. E. COOPER is now in Washington and told me that he would not be able to digress toward Denver.

I enclose a statement of your account which I asked McGill to prepare, dating from the last one sent you.

Owing to a press of work in Banking matters the Auditors made no audit for the quarter ending June 30th, but expect to do so this month for the quarter just closed.

The staff join me in kind regards and I am

Yours very truly,

GEORGE W. SMITH. [281]

BENSON, SMITH & CO., LTD.
Druggists.
Honolulu, T. H. May 29th, 1904.

My dear Rumsey:—

On the afternoon of the 25th, I received your cable advising that your address would be at Colorado Springs, and, later on the same date, the "China" brought your letter of the 15th, stating that you were making ready to depart from Phoenix.

I am glad that you have made the move and think that, with the improvement you have made, it will materially assist in your recovery. The whole tone of your letter indicates an improvement, a better mental condition that is indicative of a better physical condition. You will probably find, owing to the elevation, that your movements will be slow and made with an effort owing to a contracted breathing capacity. This, of course, will disappear as your lungs continue to improve.

Lacusta describes your present location as one of unequalled beauty with a climate conducive to immediate improvement and, with care to eventual restoration to health. I most sincerely hope that this may be so.

The photos sent me were very interesting. I have passed them around and all friends comment on your wild and fierce appearance in the garb of the Rooseveltain Cowboy.

The matter of the documents at Bishop & Co., I have put up to them and while, at the present writing, they say that they have nothing that everything was sent on with the draft and not returned, they

have promised to look further and advise me before the departure of the mail. Garvie has taken the matter in hand. Cockburn has only gone on a vacation.

J. H. FISHER is no longer a member of our Corporation. Some time ago I received the customary notice from Bishop & Co. that Certificate #8 for Five shares of our stock in the name of J. H. Fisher, had been hypothecated with them as security for a loan and asking us to make the usual entry on our stock books of the same. This was done.

A week ago today, (Sunday) McGonagle informed me that he had learned from Magoon that five shares of our stock, in the name of J. H. Fisher and held by Bishop & Co., were to be sold by the bank and Magoon asked McG. if he did not want the money to buy them.

McGonagle told him that he would have first to speak to me about the matter as he understood from me that any stock to be sold would first have to be offered to the firm. When McGonagle laid the matter before me I told him that he had acted rightly and that B & Co. ought to have notified us, or rather, that Fisher had acted dishonorably in not advising us, that I would go to the Bank the next, (Monday) morning and have it out with him, but that if he, McG. wanted the stock he could have it, after the firm had bought it off the hands of Bishop & Co.

The next morning I went down to the Bank and told them of what I heard and stated that there was a tacit agreement among the stockholders that any stock to be sold should be first offered to the [282]

business, that I did not propose that this block should go on the market and that we stood prepared to take it up at once.

They told me that they had had instructions to sell all of the securities deposited with them by Fisher as security and that the block of our stock was among them and was to be sold but that they were perfectly willing that we should take it. On the 24th I took the stock up, at par, and at once passed it over to McGonagle, or rather a receipt, and enclose herewith the new certificate for your signature. The stock is now practically limited to those actually concerned in the work of the business.

I gave Fisher a mild talking to about the matter and he admitted that it was shame that prevented his coming to me with an explanation.

You will remember that, acting on advice of attorneys, we have never made the "Corporation Returns" to the Treasurer. While admitting that the law was an excellent one as far as Corporations were concerned, whose stock was on the market, to be bought and sold by the public, we held that a private corporation like ours, *were* the stock was in a few hands and not on the market, that the return was not called for and to make it would only open up your business to the inspection of your competitor. Witness the information obtained by Newman. This idea has prevailed more this year than before and many of the local, mercantile, corporations declined to make their exhibit; notably, Lewers & Cooke, McInerny, C. M. Cooke, Ltd., and a number of others. The new Treasurer, A. J. Campbell, has decided to

try and enforce the matter and has selected our house as the one on which to make the test. He sent us a notice that unless a return was made within a reasonable time legal proceedings would be taken.

The matter was at once laid before the MERCHANTS ASSOCIATION who have taken entire charge of the case, employed the attorneys etc. The attorneys tell us that the Government have not a leg to stand on and that there is absolutely no penalty. You will remember that the Merchants Association won the Tax Appeal cases of the Pacific Hardware Co., and the 'Kash'' Co., whereby the Court decided that the merchant could deduct a reasonable percentage from his return to bring "to actual market value." This decision saved the mercantile community thousands of dollars in taxes. They will also win the present case if it is ever brought. The attorneys do not think that it will be pushed.

On the night of the 25th, May, my father passed to his long sleep. For the past three months his mind has been a practical blank, and for twelve days before his death he had been unconscious, merely the animal functions prevailing. He passed away without recovering consciousness. I am sure that it is a great relief to him, if he can look back, and it is certainly a relief to me for it has been a heavy burden, both mentally and physically.

His remains were at once cremated and the services over his ashes were held in the Cathedral on the afternoon of the 26th. The Bishop and the Reverends, Fitz, Usborne, Simpson and Pottwain officiating.

Norman Halstead has gone out of the Hollister Drug Co. Failing health is given as the cause. I do not know who his successor is to be. [283]

The Governor and the Republican delegation are on their way to Chicago to attend the Republican convention. The large number of departures from the islands has seriously affected the retail business of the town. The Dry Goods men are the chief complainants.

I shall continue this on another sheet as soon as I learn, to-morrow in regard to your papers.

GARVIE advises me that all of the papers were sent forward with the draft and that none of them have been returned.

June 1st, 1904.

Under the circumstances your only course will be to write to the people in New York for originals or duplicates.

May has just closed with a very good business and, on the whole I think that it is better than I was led to expect from the outlook.

The other houses in our line are complaining very much.

Our new man, to take Meyers' place, arrived this morning. The first impression is a good one and the boys seem to think that he will do very well.

With kind regards, personal and from the staff, I am,

Yours very truly,

GEO. W. SMITH. [284]

BROWN HOTEL.

Denver, Colo., May 29, 1904.

My dear George:

I confirm my cable of last Wednesday "address Colorado Springs" Yesume I will get out next week for there it has been cold and rainy here so Keep Close. I will feel better here something to eat for a poor lungers defective appetite and fresh air bet the to*r*id heat and hard run up here late trains and loss sleep lost five pounds but will get it back and more I believe here. I have many friends, fraternal, laymen, men and women here, but a lunger don't feel much like going around where he is liable to be invited out and has to cough, etc. I may get around later in Summer, I am here to buy some clothes and get information as to best location. I send by separate cover papers that may be of interest to you and then the Prom Com booklet on Oakes Home may be well to keep in office for future reference. My illness in the Sisters Hospital Phaemr cost me something over $200 while the same here with its superior service including nurse would have cost just $100 and there is another one being built here even larger. In looking over my letter I find from Bishop Restarack one to Rev. Oakes and the Bishop here which will set me O. K. if I get sick enough. I have been out to see the Home and it's fine but I don't need it now. I have letter also to its medical head Dr. Bonning here and Dr. Gallagher, specialist of tuberculosis throat. We had two buds ones on rach one a bright young physician.

Dr. Gallagher has gone to Atlantic City, N. J., with a paper on Laringall Tuberculosis. I hope to read it later, then a letter to Dr. Anderson at Springs. The eminent Dr. there, both of which I shall consult if necessary. I have had some interesting studies and observations in the disease though not very—there are other diseases worse than this that are as common.

I hear Dyke is in Arizona with throat tuberculosis.

I met to-day Mr. Knap principal large public school here a man of character and had a long talk with him, he told me of Dyke. He is brother of Miss Alice Knapp of Kam School and I sent my regards. She is here till August.

I have transmitted to Dr. Wood my final and third examination by Dr. Craig and have asked him to inform you after comparison with his complete records and what I have further told him how I feel. His medical opinion as to my case and forward also to me to cover any lack of details I may be unable to give you.

All my mail ford thus far will be forwarded from Phoenix to my future address.

Kindly change advertiser Add. I note your add in Av. for warehous and stockman. Has Ed fallen for good am very sorry. I see many com travelers I knew in years gone by. Whichman was here and family left for Castlushwark.

Lesinsky who was in Honolulu in Jany for Ricksicker is here and is very cordial and has tried every way to again obtain bus and [285] wants to write

May 29/04.

you but I discouraged it and told him I was not here on bus he has private means stands well and pays his own expenses, and sells on com. He intends Q. T. to place Joe Schwartz in charge of sales there did not tell any one. I met one of Reddingtons men here a young fellow the house sold here a carload of toilet paper and he is here to collect for what is sold and disposed of the bal Lesinsky had only a letter from Ryan to Phleuger. He realizes ours is the house. He asked if we owned any other houses in Hilo or Hon. I see the foot prints of Pfluger as they are fit together from conversation. I take daily rides on trolley cars all over city to get fresh ozone.

Your latter of May 8 was as good to me as a course of medicine very interesting. I recd. two days before discovering Addenda of 10th of Meyers B. Viasca—

Kindly send for my a/c *pkg.* Haw souvenir of postal cards as we had. I wish them for Sweeney asst. cashier Phoenix Nat. Bank. He was very kind to me for his daughter.

Remember me to Mrs. and Miss Smith in S. F. and to your father.

I must say your treatment of Meyers was considerate to the extreme more than he deserved as you have done right along with him. Did I see Bottomly in booking for the coast, ask Lacusta to look me up. Yes, the adjustment bus is materializing sooner than expected. Our house can best afford to abide what is the harvest by this time.

With best wishes to you and yours and regards to each one of the staff and all friends, I am,

Very sincerely yours,

S. L. RUMSEY.

Isolution is the strongest structure I am trying to overcome in my life I will get well before that.

Feel no ill effects of altitude from 1200 ft. Ariz. to one mile, here Colorado Springs 6000 ft. a good sign of condition for white plagues. Sleep better.

R. [286]

HOTEL SAVOY.

Denver, Colo., Nov. 30/1905.

Dear George:

Your letter of Oct. 6 at hand. I have been absent from Denver Oct. and part of Nov. and with my wife visiting Lexington, Ky. her former home and en route Cincinatti and Chicago. I intended to revisit my people in N. Y. when I would have cabled you but on acct of bad weather had to cut it out. (to my regret.) It may be my last opportunity and ret here.

I regret you have worried over my marriage. I arrived in Denver the night before Dr. Wood before that I had set no date. When I met Dr. I told him I would be married and if possible would like him to act for my wife but could not decide owing to circumstances necessary to be adjusted and as it was he departed. I asked him to announce it would take place to you. I was afterward able to carry it out sooner than I expected.

I cannot now see after due deliberation how it complicates my bus relation with the firm and if any

change is made it will be less complicated than heretofore. I am not in a position as yet to define the final change in my affairs to advise you but will do so at once at the proper time. The paramount one is to get well. I have never had the remotest feeling or intention to avoid my duty or evade my obligations to you or of the corporation. I am open to conviction.

The firm has been through critical times as I know even without definite advice and so has each member of course but no other member has been doubly assailed as I have with ill health at the same time and I hope to carry both so long as it is possible, giving up one or the other if need be. It has been a great source of regret from a/c. but of course you know I could not avoid it. Drs. bills and other expenses altogether too high. It cost me over $100 for nose and throat treatment but that was successful.

Dr. Wood asked me if I had temperature I told him none. He must have been guided by the pulse although that should be more rapid than three Standard. Thermometers have indicated none since I left Ariz. You sent Specific and Perfection receipts but no Shrine card, East Star or Templar receipts.

I wrote Tucker last yr. to collect all from you I am in receipt of my Wy Cat and cast for which I thank you, McG I had arranged to be my guest at Colorado Springs and remained there a month longer for that reason and wired him S. F. to find he had routed another way and then left for Glenwood, and later here and did not get notice soon enough that morning I

was unwell and did not expect him by the train so early and then he had arranged to go same evening so we had no time together to my disappointment. I did not feel I neglected him. I have not learned that Tucker laid over here and see his ret in the papers also Cooper. Can you advise me of any safe investments on the Island not for speculation but for permanent income. "Trust funds rates etc." [287]

I do not note any particular change in my condition and keep around.

The Rockies are deep in snow and winter is on and not inviting weather south. If this condition keeps up I may go to So. Cal. for winter in order to get out doors more.

Stm of a/c recd. I would like to have another L/C which will have to be my last. I shall have to get some temporary occupation here to cover expense.

The accident Policy together with Corres on Same from SF Office has just been recd. by me thro local office here and all have been ret to S. F. Office. You sent me the *old* expired Policy which was in my box first one I took out afterwards taking out The improved one, the old one 30.00 per yr The new one 50.00 per Year. Kindly have the matter attended to —I am advised The Policy in force only requires my written request for Change of Beneficiary—While the old would require consent of The beneficiary who is not aware of its existence. I enclose My request for Same.

Bruce should have known This for he advised me on The new Policy—Old Policy ret #3060. New #9123.

Strange fate That removes Isenberg when others less useful Could be spared.

Thus consolidation died out entirely.

Thanking you for the trouble of insurance matter.

With kindest regards to the Staff I am

Very truly yours,

S. L. RUMSEY. [288]

S. L. RUMSEY,
801 North Nevada Ave.
Cor. Dale St.,
Colorado Springs, Colorado.

April 22/08.

Mr. Geo. W. Smith,
President, Benson, Smith & Co. Ltd.,
Honolulu, Hawaii.

Dear Sir:

As I have not received the Liquidation for the stock from you as promised and to which you agreed to send in Dec. or Jany last am at a loss to understand just what your attitude in the matter is. For the past four years you are aware I have been drawing on my principal and need to so conserve my funds to the best advantage. If I had double the amt. and at double the income I have been receiving I could not live on it.

Your members each of you are making a living even with dividends withdrawn, I am not. You are doing the work I am not. On that basis I am entitled to my investment.

The corporation has saved my salary in the four years, and dividends in part—I receive nothing for

my investment, I should receive interest in lieu of income at least. In view of the fact that I can do much better now and am compelled to do it I must of necessity embrace relief methods to that end. I could have controlled a bus here the end of year that would net six thousand a year on an investment of 15000 had I that money in hand. I had to let it pass. I cannot wait for something to turn up—You hold up my stock pass dividends what remains for even my temporary relief. You would refuse me the right of transfer, yet provide no remedy. The mentioned burden of taking this stock is offset by corresponding reduction in liabilities. You withdraw my position and salary hence you did not consider it a loss to the business. Yet paradoxically you do by withholding the Insurance policy—I have done all I could to facilitate matters as you wished them leaving myself out of consideration.

Though a stockholder you have decided I am not entitled to report at annual meeting. Hobron was your enemy as well as competitor yet he must be provided for and I not. Tho a director at the time of the taking over I am in ignorance of the cost of the transaction to the house.

You are asking me to carry a burden entirely beyong my capacity, I have deferred writing hoping meanwhile to receive the balance and transmit stock held. The stock is worth something or nothing I believe it is worth its face value. Your letter of Feby. 16, gives me no advice as to why you did not take it up as you had agreed. I would like you to send me

the proxy I left with you when leaving the Islands as its purpose is no longer in force.

From your letter I take it you are carrying a larger stock than the bus would seem to warrant and while the volume of business increases the profits decrease from year to year. [289]

As you had provided for the taking over of my stock I did not anticipate the temporary flurry to intervene. I paid you 7% when I was taking up the stock until paid for but to not recollect that you allowed me interest on any balance I had with you from time to time tho there was no agreement as to that and I did my banking thru the house.

I trust you will see a solution of this matter that will enable me to realize at once.

With regards to all, I am

Very truly yours,

(Sgd.) S. L. RUMSEY. [290]

NEW YORK LIFE INSURANCE COMPANY.

Darwin P. Kingsley, President.

346 Broadway, New York.

New York, September 2, 1910.

James H. McIntosh,

General Counsel.

C. B.

Messrs. Benson, Smith & Co., Ltd.,

Honolulu, Hawaii,

Sandwich Islands.

Gentlemen:

In re Emma Forsythe Rumsey vs. New York Life Insurance Company—Policy 3,442,989—Samuel L. Rumsey.

This Company has just received from its Honolulu Branch Office claimant's statement No. 1, signed by James C. McGill, Treasurer of Benson, Smith & Co., Ltd., in which he makes claim to the proceeds of this Policy as "Treasurer and by authority of Benson, Smith & Co. Ltd., owners of and beneficiaries under the Policy."

On August 17th last the Superintendent of our Policy Claims Department wrote you stating that proofs of death had been filed by Emma Forsythe Rumsey who made claim to the proceeds of this Policy as beneficiary. Thereafter and on August 19th, the Company received from the Insurance Commissioner of Colorado a copy of a Summons and Complaint which had been served upon him in an action brought by Emma Forsythe Rumsey against the New York Life Insurance Company in the District Court in and for the City and County of Denver, State of Colorado. On August 22nd the Superintendent of our Policy Claims Department cabled you as follows: "Emma Forsythe Rumsey has filed proofs death Samuel L. Rumsey and claim under insured's order of July ninth—naught seven to make her beneficiary. Suit filed District Court of Denver County, Colorado. Will you appear in this action? Cable reply stating decision." The Company, as yet, has had no reply to this cable.

I enclose herewith copy of the Summons and Complaint in the action brought by Mrs. Rumsey, and on reading the same you will see the exact grounds of her claim. You will note that the plaintiff alleges therein that on June 11th, 1910, the defendant ac-

cepted and received from the plaintiff, as beneficiary under the Policy, the annual premium of $232.30. The facts about the June 11th, 1910, premium are as follows: On June 11th, the amount of the premium was tendered by the attorney for Mrs. Rumsey to the cashier of the Company's Denver Branch Office. The cashier having no knowledge about this policy did not accept this money as payment of the premium, but accepted it only with the understanding that he would forward it to the Company's Home Office for such action as it might deem proper. Immediately upon receipt of this money at the Home Office the Comptroller communicated with the cashier of the Honolulu Branch Office and was advised by him that the June 11th, 1910, premium had been paid by you on June 9th, through the Honolulu Branch Office. Refund of the amount paid by Mr. O'Donnell was thereupon ordered, and I presume that by this time such refund has been made, or at least that this amount has been rendered to Mr. O'Donnell as attorney for Mrs. Rumsey.

You, of course, understand that the Company is not denying liability on this Policy, but is ready, willing and able to pay the proceeds of the same. Under the practice of the court [291] of Colorado the court will allow your firm to enter its appearance and become a party to the above entitled suit. Therefore kindly avail yourselves of this right and the Company will at once pay the proceeds of the Policy into Court for the benefit of whichever of the rival claimants the court shall find is entitled thereto.

The attorneys for Mrs. Rumsey are Messrs. T. J. O'Donnell and J. M. Graham, whose address is 822–826 Ernest & Cranmer Block, Denver, Colorado. The attorney for the Company is Charles W. Waterman of Denver.

Kindly let us hear from you promptly, and oblige.

Very truly yours,

(S.) JAMES H. McINTOSH,

General Counsel.

Enc. [292]

September 16, 1910.

Messrs. Benson, Smith & Company, Ltd.,

Honolulu,

Dear Sirs:

We beg to advise you that, in our opinion, you should refuse to intervene in the suit brought by Emma Forsythe Rumsey against New York Life Insurance Company, in the District Court of the City and County of Denver, Colorado, upon the policy issued by the New York Life Insurance Company on the life of Samuel L. Rumsey, No. 3,442,989, concerning which suit you have been advised by the General Counsel of the New York Life Insurance Company.

The Insurance Company is, of course, especially desirous that you should so intervene, as it could, in that event, pay the amount specified in the policy, into court, and leave the controversy to be litigated by you and Mrs. Rumsey. However, to do this, you would be obliged to prove your case in the court in Denver, a place far distant, which would be exceedingly troublesome and might be prejudicial. This you are not obliged to do, for if the Insurance Com-

pany refuses to pay you, you are at liberty to sue it here in the local courts, where your proofs are immediately at hand and easily available at the trial.

We enclose herewith form of letter to be written by you to the Insurance Company, should you decide to act in accordance with our advise.

Very truly yours,
HOLMES & OLSON.

Encl.
CHO/C. [293]

Honolulu, T. H., September 16th, 1910.

Messrs. New York Life Insurance Company,
346 Broadway,
New York City, N. Y.

Dear Sirs:

Rumsey vs. New York Life Insurance Co.—Policy No. 3,442,989, on life of Samuel L. Rumsey.

We acknowledge receipt of the communication of your General Counsel, Mr. James H. McIntosh, dated Sept. 2, 1910, advising us that Emma Forsythe Rumsey has brought suit in Denver, Colorado, against you, claiming the amount payable under the above mentioned policy, and enclosing copies of the Complaint and Summons.

Mr. McIntosh states that on August 22d, the Superintendent of your Policy Claims Department cabled us concerning this suit. However, no such cablegram has been received by us.

We observe in the copy of Mrs. Rumsey's Complaint that the provision of the policy governing change of beneficiaries, is incompletely quoted. The following is a full and complete quotation of this

provision in the policy, the underlined portion thereof being the part omitted in Mrs. Rumsey's complaint:

> "CHANGE OF BENEFICIARY.—The insured, having reserved the right, may change the beneficiary, or beneficiaries, at any time during the continuance of this policy, by written notice to the company at the Home Office, provided this policy is not then assigned. The insured may at any time, by written notice to the company at the Home Office, declare any beneficiary then named to be an absolute beneficiary under this policy. *No designation or change of beneficiary, or declaration of an absolute beneficiary, shall take effect until endorsed on this policy by the company at the Home Office.*

It is readily apparent why the underlined portion has been omitted, for to have included the same would have required the further allegation that the alleged change of beneficiary from our name to that of Mrs. Rumsey had been endorsed on the policy itself by your company at your Home Office. Such an allegation could not be made by Mrs. Rumsey, as the policy has always been, and is now, in our possession, and no such change of beneficiary has ever been endorsed on the policy.

While we realize that it would avoid multiplying suits, if the differences between Mrs. Rumsey and ourselves with regard to the policy could be disposed of in one proceeding, still, after taking advice of counsel, we do not feel, that we can intervene in the Colorado suit, which would require us to present our case

in a foreign court and more than 3,000 miles from Hawaii.

We must therefore look to you for payment to us of the policy, to which we are plainly entitled.

Yours truly,
BENSON, SMITH & CO. [294]

Postal Telegraph—Commercial Cables.
CABLEGRAM.
Honolulu, September 17, 1910.
(Rec'd Sep. 19th.)

Nylic—New York.

I have received your letter of 2nd day of September. The telegram you refer to has not reach us. I must decline proposal. Interfering.

BENSON SMITH. [295]

Sept. 20, 1910.

New York Life Insurance Co.,
New York, N. Y.

Gentlemen:

We confirm our letter of the 16th inst., also our cablegram of the 17th,

"Nylic
New York
Laniferas seedsman taire decagynia peridoide indotta
BENSON SMITH."

to say

"We have received your letter of the 2d day of Sept. The Telegram you refer to has not reached us. We must decline proposal interfering."

We are now in receipt of information from the New York office of the Commercial Pacific Cable Co. that they have no record of any message being filed with

them as set forth in your letter of the 17th of August.

Yours very truly,
BENSON, SMITH & CO., LTD.

GWS/JKS. [296]

New York, September 21, 1910.

M/—W.

Messrs. Benson, Smith & Co., Ltd.,
Fort & Hotel Streets,
Honolulu, Hawaii, Sandwich Islands.

In re Emma Forsyth Rumsey v. New York Life Insurance Company—Policy #3,442,989—Samuel L. Rumsey.

Gentlemen:

Your cable of September 17th is received, as follows,—

> "I have received your letter of the 2nd day of September. The telegram your refer to has not reached us. I must decline proposal interfering."

In our September 2nd letter we enclosed to you a copy of the summons and complaint in the above entitled case in the District Court in and for the City of Denver, Colorado. In view of your refusal to intervene and be made a party to the suit, thus enabling the Company to pay the proceeds of the insurance into court for the benefit of the party the court shall find entitled thereto, we now here notify you that the Company's time to answer the plaintiff's complaint has been extended and we request and demand that you come forward and in the name of this Company, or in any other way you may choose, or the court may order to assent to, or otherwise, take charge of, con-

duct and make the defense to said suit. If you fail to defend said suit the Company will file an answer and make such defense on your behalf as the statements you have made to it will warrant it in making and as it can. We very much prefer that you take charge of and conduct the defense to the plaintiff's suit, because knowing what your defense is to the claim of Mrs. Rumsey you can certainly make it more effectively than the Company can; but if you insist on the Company making your defense for you it will do the best it can, and whatever the results of the litigation may be, the Company will expect you to accept the consequences and be bound by the judgment of the court.

Charles W. Waterman, of Denver, Colorado, is a very competent lawyer, and is the regular lawyer in Colorado of this Company. We recommend him to you if you conclude to defend Mrs. Rumsey's case, for he is the lawyer this Company will employ for this purpose if you fail or refuse to make the defense.

Yours very truly,

(Sgd.) JAMES H. McINTOSH,
General Counsel. [297]

Honolulu, October 11, 1910.

Messrs. New York Life Insurance Company,
346 Broadway, New York.

Dear Sirs:

In reply to your letter of the 21st of Sept. 1910, we beg to state that we have already written to you explaining our attitude in reference to the suit instituted in Denver, Colorado, by Emma Forsyth Rumsey against your Company, to recover the amount

of Policy No. 3,442,989 issued by your Company on the life of Samuel L. Rumsey, which still remains the same.

The bearer of this letter, Mr. Clarence H. Olson, is a member of the firm of Holmes, Stanley & Olson, of Honolulu, who are our attorneys representing us in this matter, and will present to you a Power of Attorney from us authorizing him to request payment on our behalf of the amount of the said Policy. We trust that you will see your way clear to pay to him the amount called for by the Policy, as to us it seems perfectly clear that Mrs. Rumsey's claim has no foundation whatever.

Very truly yours,
BENSON, SMITH & CO., LTD.,
By ————————,
Its President. [298]

KNOW ALL MEN BY THESE PRESENTS: That BENSON, SMITH & COMPANY, LIMITED, an Hawaiian corporation, does hereby make, constitute and appoint CLARENCE H. OLSON, of the City and County of Honolulu, Territory of Hawaii, its true and lawful attorney for it and in its name, place and stead, and as its act and deed;

To demand and receive, at the home office of the New York Life Insurance Company, at New York, payment of the amount payable under policy No. 3,442,989 issued by said New York Life Insurance Company on the life of Samuel L. Rumsey (now deceased), and to sign and give effectual receipt or receipts and discharge or discharges, for all and any moneys that shall come into his hands by virtue of the

powers herein conveyed, which receipt, receipts, discharge or discharges, whether given in its name or in the name of its said attorney shall exonerate the said New York Life Insurance Company from seeing to the application thereof and from being responsible for the loss or misapplication thereof;

And generally to act as its attorney in relation to the premises and on its behalf to execute and do all such instruments, acts, matters and things necessary or proper as fully and effectually in all respects as it itself either personally or through its proper officers could do if it or they were personally present:

And it hereby for itself and its successors ratifies and confirms and agrees to ratify and confirm whatsoever its said attorney shall do or purport to do by virtue of these presents.

IN WITNESS WHEREOF, the said BENSON, SMITH & COMPANY, LIMITED, has caused its corporate name to be signed and its corporate seal to be affixed, hereunto, by its president and treasurer thereunto duly authorized, this 11th day of October, 1910.

BENSON, SMITH & COMPANY, LIMITED,

By ————————————,
Its President.

By ————————————,
Its Treasurer. [299]

December 1st, 1910.

Benson, Smith & Company, Ltd.,
Honolulu, Hawaiian Territory:

Dear Sirs:

This will advise you that Emma Forsyth Rumsey, widow of Samuel L. Rumsey, deceased, has brought suit against The New York Life Insurance Company, in the District Court within and for the City and County of Denver and State of Colorado, to recover the contents of a certain policy issued by The New York Life Insurance Company upon the life of said Samuel L. Rumsey, which policy was numbered 3442989.

I represent The New York Life Insurance Company, and have prepared an answer in the above mentioned suit to be filed on behalf of The New York Life Insurance Company, a copy of which answer as it will be filed is herewith enclosed for your information.

Some days ago I wrote your attorneys, Messrs. Holmes, Stanley & Olson, at Honolulu, with reference to taking depositions of the officers of your Company relative to this litigation. I should be pleased if you would lay this answer before your attorneys, and advise me, or have them advise me, whether or not this answer sets forth in truth and fact the situation as it actually exists, and whether or not the officers of your Company can give depositions sustaining the allegations of the answer, and if so, the names of those who will so testify.

As I shall be forced to take these depositions early in the coming year I wish that you would afford me

this information as early as your convenience will permit.

Yours truly,
CHARLES W. WATERMAN.

W–S.
Enc. [300]

HOLMES, STANLEY & OLSON
Attorneys at Law
Honolulu, T. H.,

Henry Holmes.
Wm. L. Stanley.
Clarence H. Olson.

Cable Address:
Stanley, Hon.
Lieber's Code

Honolulu, December 13, 1910.

Chas. W. Waterman, Esq.,
Counsellor at Law,
Denver, Colo.

Dear Sir:

Messrs. Benson, Smith & Co., Ltd., have handed to us your letters of December 1st and 3rd, 1910 (the latter enclosing a copy of the answer you propose to file in the suit brought against the New York Life Insurance Company by Emma Forsyth Rumsey) with a request that we reply thereto. We have examined the said form of answer with a view to ascertaining as to whether or not it sets forth correctly the circumstances attending the application for and issuance of the policy on the life of the late S. L. Rumsey, the object for which said policy was taken out and the manner in which, and the party by whom, the premiums due thereon have been paid. We are of opinion that it does so, and we believe that the statements of Messrs G. W. Smith, A. J. Gignoux and

W. A. Purdy forwarded to you by us on the 10th inst. will be all that you should require in order to secure such depositions as may be necessary to support the allegations of your proposed answer.

Your truly,

(Signed) HOLMES, STANLEY & OLSON.

WLS/L. [301]

Denver, Colo. November 15th, 1911.

RUMSEY v. NEW YORK LIFE INSURANCE CO.

Messrs. Holmes, Stanley & Olson,

Honolulu, Hawaiian Territory.

Dear Sirs:

I received your favor of October 30th, 1911, acknowledging receipt of my letter of the 17th ult.

The Rumsey case was set for trial on October 27th, 1911, but a short time before, an application to file a petition in intervention on behalf of Mrs. Rumsey, as executrix of the will of Rumsey, was made. There was an argument upon this application lasting nearly two days. The Court took the matter under advisement, and after a delay of several days announced its ruling denying the application. Inasmuch as nearly all the questions in the case were argued upon this hearing, the ruling of the Court indicates a decision in favor of the Insurance Company upon the trial, although this is by no means certain. No new date

has been set as yet for the trial.

Yours truly,

(Sgd.) CHARLES W. WATERMAN.

J–S.

Received Nov. 28, 1911.

Ans'd.

BENSON, SMITH & CO., LTD. [302]

XVI.

That on the 30th day of August, 1912, the said Benson, Smith & Company, Limited, duly commenced a suit in *assumpsit* against said New York Life Insurance Company in the Circuit Court of the First Judicial Circuit, Territory of Hawaii, for the recovery from said New York Life Insurance Company of the proceeds of said policy of insurance so issued upon the life of the said Samuel L. Rumsey. That in said suit the said New York Life Insurance Company filed its answer, and upon the issues thus joined and after a trial of said cause, jury waived, on its merits and on, to wit, the 24th day of February, 1913, said Court rendered its decision in writing in said cause in words and figures as follows, to wit:

"DECISION.

In this matter the court finds that all the material allegations of the first count of the plaintiff's complaint have been fully established, and it also appears that there has been no substitution of the beneficiary first named in the policy as issued by the defendant. For these reasons, judgment should be entered for the plaintiff as prayed for, and which is so ordered.

HENRY E. COOPER,

Judge."

Honolulu, February 24, 1913.

That thereupon judgment was duly entered in said cause in favor of the said Benson, Smith & Company, Limited, and against the said New York Life Insurance Company, for the amount of said insurance with interest and costs in the full sum of Five Thousand Nine Hundred Sixty-nine and 56/100 Dollars ($5,969.56). That thereafter and on the 3d day of April, 1913, the said New York Life Insurance Company was compelled to and did pay to the said Benson, Smith & Company, Limited, the amount of said judgment and costs in full, and thereafter satisfaction of judgment was duly filed in said court and cause.

That the said Emma Forsyth Rumsey had no notice of said action, nor was she joined as a party thereto. That the said Emma Forsyth [303] Rumsey has never at any time resided in the Territory of Hawaii.

That the following are true and correct copies of the complaint of said Benson, Smith & Company, Limited (omitting, however, all counts except the first thereof, upon which judgment was rendered), the answer of said New York Life Insurance Company and the satisfaction of judgment, filed in said cause: [304]

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

January Term, 1912.

ASSUMPSIT—INSURANCE POLICY.

BENSON, SMITH, & COMPANY, LIMITED, an Hawaiian Corporation,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a New York Corporation,

Defendant.

Complaint.

To the Honorable HENRY E. COOPER, First Judge of the Circuit Court, First Judicial Circuit, Territory of Hawaii:

Comes now BENSON, SMITH & COMPANY, LIMITED, a corporation, plaintiff, and complains of the New York Life Insurance Company, a corporation, defendant, and for causes of action sets forth and alleges:

FIRST COUNT: That the plaintiff is a corporation duly organized and existing under the laws of the Territory of Hawaii and doing business in the City and County of Honolulu, Territory of Hawaii.

That defendant is a corporation duly incorporated and existing under the laws of the State of New York and empowered by law to do and to transact the business of life insurance, and having an office and doing said life insurance business in said Hono-

lulu and generally throughout the said Territory of Hawaii.

That the defendant heretofore, to wit: on or about the 11th day of June, 1903, issued a certain policy of insurance dated June 11, 1903, and numbered 3442989, a copy of which said policy is hereto annexed marked Exhibit "A" and made a part hereof, whereby the said defendant corporation insured the life of one Samuel L. Rumsey, late of Honolulu, deceased, for the sum of $5,000.00, payable to the firm of Benson, Smith & Company, Ltd., in consideration of the due payment of the premiums in said policy set forth and the observance and performance of the terms and conditions in said policy expressed, all of which plaintiff alleges have been observed, fulfilled and performed and all the premiums duly paid when due.

And the plaintiff further alleges that the said Samuel L. Rumsey died on the 27th day of July, 1910, at Los Angeles, State of California.

That the defendant corporation had due notice and proofs of the death of said Samuel L. Rumsey.

That at the time of the issuance of the said policy and at all times thereafter up to and including the date of the death of said Samuel L. Rumsey and the commencement of these proceedings the plaintiff was and is the beneficiary under said policy and entitled to the amount payable thereunder. [305]

And the plaintiff further alleges that at the time of the death of said Samuel L. Rumsey, the said policy was in full force and effect and the amount thereof, namely, the sum of $5,000.00 then and there-

upon became due from the defendant to the plaintiff and the defendant, though often requested, has neglected and refused to pay and still neglects and refuses to pay the same or any part thereof to the plaintiff.

* * * * * * * * * * *

Wherefore the said plaintiff prays that it may have judgment against the said defendant in the sum of $5,000.00, together with interest from the 27th day of July, 1910, costs and attorney's fees; and further asks the process of this court to cite the defendant to appear and answer this complaint.

Dated, August 30th, 1912.

BENSON, SMITH & COMPANY, LIMITED,

By Said Plaintiff,

(Signed) GEO. W. SMITH,
President,
and

(Signed) W. C. McGONAGLE,
Secretary.

Territory of Hawaii,
City and County of Honolulu,—ss.

George W. Smith, being first duly sworn, deposes and says that he is President of Benson, Smith & Company, Limited, a corporation, the plaintiff above named, and that he is authorized to make and does make this deposition in its behalf; that he has read the foregoing complaint and knows the contents thereof, and that all of the matters and things therein stated and set forth are true to the best of his

knowledge, information and belief.

(Signed) GEO. W. SMITH.

Subscribed and sworn to before me this 30th day of August, 1912.

[Seal] (Signed) F. F. FERNANDES,
Notary Public, First Judicial Circuit, T. H. [306]

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

January Term 1912.

ASSUMPSIT—INSURANCE POLICY—L. No. 7606.

BENSON, SMITH & COMPANY, LIMITED,
Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY,
a New York Corporation,
Defendant.

Answer of Defendant.

Now comes the New York Life Insurance Company, defendant in the above-entitled action, by its attorneys, Thompson, Wilder Watson & Lymer, and for answer to plaintiff's complaint, says:

This defendant admits that the plaintiff is a corporation duly organized and existing under the laws of the Territory of Hawaii, and doing business in the city and county of Honolulu, Territory of Hawaii.

Admits that it is a corporation duly incorporated and existing under the laws of the State of New York, and empowered by law to do and to transact

the business of life insurance, and having an office and doing said life insurance busines in said Honolulu and generally throughout the said Territory of Hawaii.

Admits that during the month of June, A. D. 1903, this defendant issued a certain policy of insurance, No. 3,442,989, upon the life of Samuel L. Rumsey, therein designated as the insured, wherein and whereby it insured the life of Samuel L. Rumsey in the sum of Five Thousand Dollars ($5,000.00) in favor of a certain beneficiary in said policy of insurance specified, to wit, Benson, Smith & Company, Limited.

Admits that Exhibit "A" attached to the plaintiff's complaint is a true copy of said policy.

Admits that said Samuel L. Rumsey died on the 27th day of July, 1910, at Los Angeles, California, and that on August 17, 1910, due notice and proofs of the death of said insured were made to the defendant.

Defendant denies each and every allegation in the complaint contained, and each and every allegation in every count thereof, not hereinbefore in this answer expressly admitted.

And for further and separate answer to plaintiff's complaint defendant says:

That pursuant to the terms of policy No. 3,442,989, referred to as Exhibit "A" in plaintiff's complaint, Samuel L. Rumsey, the insured named in said policy, on July 9th, 1907, notified defendant in writing at its Home Office that the beneficiary under said policy [307] was changed from Benson, Smith & Com-

pany, Limited, to Emma Forsythe Rumsey, the then wife of said Samuel L. Rumsey, a copy of which notice in writing is hereto attached and made a part hereof marked Exhibit "D."

That on said July 9, 1907, and up to the time of the death of said Samuel L. Rumsey on July 27, 1910, said policy No. 3,442,989 was not assigned.

That on or about August 17, 1910, said Emma Forsythe Rumsey, the widow of said Samuel L. Rumsey, filed with defendant proofs of death of said Samuel L. Rumsey according to the terms of said policy No. 3,442,989.

That on August 15, 1910, said Emma Forsythe Rumsey, the widow of Samuel L. Rumsey, brought an action against defendant in the District Court for the City and County of Denver, State of Colorado, to recover the proceeds of said policy No. 3,442,989, a copy of the complaint in said action being attached hereto and made a part hereof marked Exhibit "B."

That said action brought by said Emma Forsythe Rumsey against defendant is at issue, but defendant has been unable as yet to have the same tried notwithstanding it has repeatedly and continously endeavored to have it tried.

That defendant is ready, able and willing to pay the amount of said policy numbered 3,442,989 to whomsoever is legally entitled thereto, but by reason of the conflicting claims thereto by plaintiff and said Emma Forsythe Rumsey, it is uncertain which of said claimants is legally entitled thereto.

That defendant is and has been unable to interplead plaintiff in the action in Colorado brought by

said Emma Forsythe Rumsey by reason of the fact that the District Court of the City and County of Denver, State of Colorado, never had and has not now jurisdiction over plaintiff.

That defendant is unable to interplead with said Emma Forsythe Rumsey in this action by reason of the fact that at the time this action was instituted said Emma Forsythe Rumsey was and now is a resident of the Philippine Islands, and this Honorable Court did not and does not now have jurisdiction over the person of said Emma Forsythe Rumsey.

WHEREFORE defendant prays that this action may be dismissed with costs and attorneys' fees, and that in any event, this action may be stayed until said action in Colorado is finally determined.

Dated Honolulu, December 11, 1912.

NEW YORK LIFE INSURANCE COMPANY.

BY THOMPSON, WILDER, WATSON & LYMER,

A. A. W.,

Its Attorneys. [308]

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

ASSUMPSIT—LAW No. 7606.

BENSON, SMITH & COMPANY, LIMITED, a Corporation,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a Corporation,

Defendant.

Satisfaction of Judgment.

Now comes the plaintiff in the above-entitled cause and hereby acknowledges full satisfaction by the defendant of the judgment rendered in the said cause in favor of the plaintiff herein on the 28th day of February, 1913.

BENSON, SMITH & COMPANY, LIMITED, a Corporation,

BY (S.) GEO. W. SMITH,

Its President and Manager.

Dated, Honolulu, April 14th, 1913. [309]

XVII.

That at the time of the institution of said last-mentioned suit, the said Emma Forsyth Rumsey was not subject to the jurisdiction of the above-entitled court or to any court in the Territory of Hawaii. That the exact whereabouts of said Emma Forsyth Rumsey at the time of the commencement of said suit and until the entry of judgment therein was unknown to said New York Life Insurance Company and to its officers and agents. That said New York Life Insurance Company in its answer in said cause duly set up that it was unable to interplead the said Emma Forsyth Rumsey in said suit by reason of the fact that at the time said suit was instituted, as well as at the time of the filing of said answer, the said Emma Forsyth Rumsey was a resident of the Philippine Islands and that said First Judicial Circuit Court of the Territory of Hawaii had no jurisdiction over the person of said Emma Forsyth Rumsey.

XVIII.

That James H. McIntosh is now and for many years has been the General Counsel of the said New York Life Insurance Company, having his permanent residence and office in the city of New York, State of New York. That the said James H. McIntosh now and for many years last past has been an attorney and counsellor at law admitted to practice in all of the courts of the State of New York, and is familiar with and qualified and competent to testify as to the laws of the State of New York.

That if called as a witness in the above-entitled action the said James H. McIntosh would testify, and the Court herein shall consider that the said James H. McIntosh has testified in this action, to the following effect:

"That at all times since the 4th day of October, 1881, by the laws of the State of New York where said respondent, New York Life [310] Insurance Company, is now and always has been domiciled and has and always has had its principal place of business, one person may take out insurance on his own life and make the insurance payable to any person, partnership, corporation or other beneficiary who he may name in the policy, and such beneficiary thereof need, under the laws of said State of New York, have no interest nor continue to have an interest in the life of the insured. That the case of Olmsted vs. Keyes, as the same is found and reported in Volume 85 of the New York Reports at page 593, sets out and declares the law of the State of New York in that regard. That said case was decided by the Court of

Appeals of the State of New York, which is the highest court of said State, and that said case has not since the said decision therein been modified or reversed by any court in said State of New York."

That the following is a true and correct copy of said decision of the Court of Appeals of the State of New York in said case of Olmsted vs. Keyes: [311]

(85 N. Y. 593.)

JOHN OLMSTED, Respondent, v. MARY L. KEYES et al., Administrators, etc., Respondents.

HELEN M. VOSBURGH, Administratrix, etc., et al., Appellants.

IT SEEMS that where a person takes out a policy of insurance upon his own life, and the amount is made payable to another having no interest in the life, or where the insured assigns his policy to one having no such interest, the beneficiary or the assignee may hold and enforce the policy, if it was valid in its inception, and was procured or the assignment made in good faith.

In 1846, L. procured a policy of insurance on his life, payable to plaintiff, as trustee for H., the wife of L. H. died intestate in 1857. In 1861, L. married M., and in 1864 plaintiff, upon the request of L., for value received, assigned the policy to M. L. died intestate in 1878, leaving M., his widow, and one child by her, and several children by his first wife, surviving him. He paid the premiums upon the policy up to his death. In an action to determine conflicting claims to the moneys paid upon the policy, the Court

found that it was the intention of L., when he procured the policy and paid the premiums, that its avails should go to his widow, if he left one, not to his children. HELD (Miller and Danforth, JJ., dissenting), that during the life of H. the policy was her property, and upon her death the title vested in L., her husband, as survivor, J. then becoming, by operation of law, his trustee, and the policy continuing valid in his hands; that the assignment vested the title in M., and that she alone was entitled to the moneys paid thereon.

Also HELD, that the common-law right of survivorship, in the husband, in such case, was not affected by the statute in respect to insurance upon the lives of husbands for the benefit of their wives. (Chap. 80, Laws of 1840, as amended by chap. 77, laws of 1862, and by chap. 821, Laws of 1873.)

Eadie v. Slimon (26 N. Y. 9.), and Barry v. E. L. A. Society (59 id. 587), distinguished.

IT SEEMS that, had the assignment been executed without consideration, it would have been valid and effectual.

(Argued March 8, 1881; decided October 4, 1881.)

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, entered upon an order made January 30, 1880, which affirmed a judgment entered upon the decision of the Court on trial at Special Term.

This action was brought by plaintiff, as trustee, to determine conflicting claims to a fund in his hands. [312]

The material facts are stated in the opinion.

(Briefs of Counsel.)

EARL, J.—On the 9th day of July, 1846, the Mutual Life Insurance Company of New York issued a policy of insurance upon the life of Lester V. Keyes to the plaintiff, John Olmsted, as trustee for Huldah Keyes, the wife of Lester, whereby, in consideration of annual premiums to be paid by such trustee, it agreed to pay to him, upon the death of Lester, the sum of $1,000. From the date of the policy to his death Lester paid the annual premiums. Lester and Huldah had several children who are defendants in this action. She died intestate in November, 1857, and thereafter, in August, 1861, Lester intermarried with the defendant Mary L. Keyes, and in August, 1864, the plaintiff, upon the request and direction of Lester, for value received, assigned to Mary L. all his right, title and interest as trustee of and for Huldah Keyes in the life policy with all the advantages to be derived therefrom, and due notice of the assignment was given to the insurance company. In January, 1878, Lester died intestate, leaving surviving him Mary L. his widow, and one child by her, and all the children of his first wife, with one exception. In the same month the defendants Burdick and Mary L. Keyes, the widow, were appointed administrators of Lester. In due time the necessary proofs of the death of Lester were made to the insurance company and it thereupon paid to the plaintiff the amount due upon the insurance policy, to wit, the sum of $1,811, which sum was in the hands of the plaintiff at the commencement of this action. Since

the commencement of this action, Helen M. Vosburgh, one of the children of Huldah, has been duly appointed the administratrix of her estates and as such administratrix she was made a party defendant in this action.

This action was commenced to determine the conflicting claims of the various defendants to the money paid to the plaintiff upon the policy. The foregoing facts were found at the Special Term and it was there also found that it was the intention of Lester, when he procured the policy and paid the premiums thereon, that the avails of the policy should go to his widow, if he left one, and not to his children; and the court at Special Term found as conclusions of law that during the life of Huldah Keyes the policy was her property, and at her death vested in her husband as survivor, and that John Olmsted then became, by operation of law, HIS trustee; that the assignment of the policy by Olmsted, as trustee by the direction of Lester, vested complete title thereto in Mary L. and that she was the sole owner of the policy at the time the money was paid to the plaintiff and is solely entitled to such money. The judgment entered upon the Special Term decision was affirmed at General Term, and the appeal to this court brings before us for determination the question, who is entitled to the money received by the plaintiff upon the policy?

This policy was taken out by Lester, for the benefit of his wife. It was an insurance upon his own life for her benefit. While one cannot insure a life in which he has no interest, every person can insure his own life for any sum upon which he can agree

with [313] an insurance company. A life insurance is not like fire insurance, a contract of indemnity, but a mere contract to pay a certain sum of money on the death of a person in consideration of the due payment of a certain annuity for his life. (Dalby v. The India and London Life Assurance Co., 28 Eng. Law & Eq. 312; Rawls v. American Life Ins. Co., 36 Barb. 357; S. C., 27 N. Y. 282; Ins. Co. v. Bailey, 13 Wall. 616.) Like every other contract to pay money such a policy is a chose in action with all the ordinary incidents of every other chose in action. It is abundantly settled in this State, that one who takes an insurance upon his own life may make the policy payable to any person whom he may name in the policy, and that such person need have no interest in the life insured, and that if the policy be valid in its inception, the party taking it may assign it to any person as he could assign any other chose in action, and that the policy will continue valid in the hands of the assignee, although he has no interest whatever in the life insured. So a creditor may take out a policy on the life of his debtor, and the policy will continue valid although the creditor has been paid and has thus ceased to have an interest in the life of the insured. In Ashley v. Ashley (3 Simons, 149), A. insured his life and afterward assigned the policy to B., for a nominal consideration; B.'s executors then sold and assigned the policy to D. for a nominal consideration, and then D.'s executors sold it to E.; and it was held that they could make a good title to the policy, and that E. was bound to complete his purchase. This case was cited and

approved in 3 Kent's Com. 370, note, and has since been cited with approval in several reported cases in this State. In St. John v. The American Mutual Life Ins. Co. (2 Duer, 419), Duer, J., a Judge very learned in the law of insurance, writing the opinion, held that an assignment of an insurance policy to one having no interest in the life insured was valid, and he said: "The objection to the recovery in this case assumes, and such was the argument, that there can be no absolute sale of a subsisting policy, and that its assignment is only valid when made as a collateral security for an antecedent debt; but, as we understand the law, a written promise to pay a sum of money is just as properly a subject of transfer, for value, where it depends upon a condition, as where it is absolute; and we can, therefore, make no distinction between the rights of a *bona fide* assignee of a policy and those of an assignee of a mortgage." He then cited the case of Ashley v. Ashley, and further said: "This case, therefore, proves not only that the absolute sale of a life policy does not affect the validity of the contract, but that the assignee for value, in the event of the death of the assured, is entitled to the same remedies as is his personal representative when the title to the policy is unchanged." This case was affirmed in this court (13 N. Y. 31), and the doctrine was there again announced that a valid policy of insurance effected by a person upon his own life is assignable, like an ordinary chose in action. Crippen, J., writing the opinion of the court, said: "I am not aware of any principle of law that distinguishes contracts of insurance upon lives from

other ordinary contracts, or that takes them out of the operation of the same legal rules which are applied to and govern such contracts. Policies of insurance are choses in action, and are governed by the same principles applicable to other agreements involving pecuniary obligations." And he further said: "I do not agree with the counsel of the defendant, that the assignee must have an insurable interest in the life of the assured in order to [314] entitle him to recover the amount of the insurance. If the policies were valid in their inception, the assignment of them to the plaintiff did not change the liability of the company." In Valton v. The National Fund Life Assurance Company (20 N. Y. 32), it was held that one who has obtained a valid insurance upon his own life may dispose of it as he sees fit, and that it is immaterial that the assignee has no interest in the life. In Rawls v. American Life Insurance Company (*supra*), it was held that it is not necessary that a party holding a policy on the life of another should have an insurable interest in such life at the time of the death to make the policy valid, if it was valid in its inception. (See, also, Clark v. Allen, 11 R. I. 439; Law of Assignments of Life Policies, by Hine & Nichols, 73, 75, 81; Bliss on Life Ins. (2d ed.), Secs. 23, 26, 30).

The rule as gathered from these authorities, is that where one takes out a policy upon his own life as an honest and *bona fide* transaction, and the amount insured is made payable to a person having no interest in the life, or where such a policy is assigned to one having no interest in the life, the beneficiary in the

one case and the assignee in the other may hold and enforce the policy if it was valid in its inception, and the policy was not procured or the assignment made as a contrivance to circumvent the law against betting, gaming and wagering policies. It follows, therefore, that one may, with the consent of the insurer, deal with a valid life policy as he could with any other chose in action, selling it, assigning it, disposing of it, and bequeathing it by will, and it has been well said that if he could not do this life policies would be deprived of a large share of their utility and value.

Therefore, but for the statutes which will hereafter be noticed, it cannot be doubted that during the lifetime of Huldah, the sole beneficiary named in the policy, she could have made a valid assignment of her interest therein to any person, and she could have disposed of her interest by will. It is true that her interest ceased at her death, but, as shown above, the policy, being valid in its inception, continued valid in the hands of the person or persons who legally took her estate. It was a contract to run until Lester's death. There was no provision in the policy that it should become void upon Huldah's death before her husband, and such a result could not have been contemplated by the parties when they entered into the contract. The policy became more valuable as the years rolled by, and at the time of Huldah's death had considerable pecuniary value, and I know of no principal of law applicable to the business of insurance which requires us to hold that her death destroyed such value. Death no more destroyed

such value than an absolute divorce would, and yet it cannot be doubted that a policy held by a wife upon the life of her husband continues valid although her interest in his life has ceased in consequence of a divorce. (Bliss on Life Ins., Sec. 30.) When she died intestate, therefore, this policy remaining a valid pecuniary obligation, her interest therein went where her other choses in action, if she had any, went.

The general rule of the common law is that the husband may, during the joint lives, reduce his wife's choses in action to possession, and thus appropriate them to his own use, or he may [315] release them or assign them so as to bar the wife's right of survivorship. (Reeves' Dom. Rel. (B. & B.'s ed.) 55, etc.; Clancy's Hus. and Wife, 109, etc.; Schuyler v. Hoyle, 5 Johns. Ch. 196; Westervelt v. Gregg, 12 N. Y. 202.) But during the joint lives the husband cannot assign or release, so as to bar the wife, surviving, her choses in action, payable after his death, or upon contingencies or at times which do not come or happen until after his death. In such cases, however, his assignment is good as against the whole world but his wife surviving. In White v. St. Barbe (1 Ves. & B. 406) the master of the rolls said that a husband can dispose of his wife's property in expectancy against every one but the wife surviving. All the choses of the wife not reduced to possession during the joint lives, by the common law, passed to the husband upon her death—all without any exception—and there is no authority to the contrary; and this is true whether such choses are then payable or

are mere reversionary or contingent interests payable at a future day, or mere possibilities. He may then release them or take payment of them without administration, if he can get payment. (Ransom v. Nichols, 22 N. Y. 110.) If administration is needed to reduce the choses to possession, he is entitled to it, and if there are no debts the administration is solely for his benefit. If, after his wife's death, the husband does not release, assign or reduce to possession her choses in action during his lifetime, then after his death his personal representatives are entitled to administration upon them for the benefit of his estate as part of his assets. (Bishop on Marr. Women, Sec. 177; Westervelt v. Gregg, *supra.*)

Now to apply these principles to this case. The wife's interest in this policy was a chose in action. At her death it passed to her husband. He then caused it to be assigned to his second wife, the defendant Mary L., and thus, within the meaning of the law, he reduced it to possession. The assignment was valid as against him and was therefore valid as against the whole world. The written assignment is expressed to have been for value received, and in the absence of proof to the contrary must be assumed to have been, but whether it was for a valuable consideration or not it was good as against him, and that is sufficient, as the rights of a surviving wife are not in question. If the chose in action had been a note payable at his death his assignment thereof would have been valid, and for precisely the same reason his assignment of this policy was valid.

There is no case which holds that a life policy for

the benefit of the wife, her husband surviving, passes by the rules of the common law to her personal representatives for the benefit of her estate, to the exclusion of her husband. On the contrary, it was said by the chancellor, in Moehring v. Mitchell (1 Barb. Ch. 264; affirmed in the Court of Appeals, 4 How. Pr. 292), that a policy upon the life of the husband for the benefit of the wife, in a case where the wife died first, and then the husband, passed, like other choses of the wife, to the personal representatives of the husband. In that case, the general rule as to the survivorship to the husband of the choses of the wife was applied to a policy of insurance taken by her upon his life. Even if it were true that, upon the death of Huldah, this policy could remain valid only in the hands of some person having an interest in the life insured, [316] here it passed to her husband and then to his second wife, and both had an interest in the life insured. There is no question here of administration upon the estate of Huldah. As stated above, such administration would have been, if necessary, there being no debts owing by her, solely for the benefit of her husband; and as the money has been paid upon the policy, the sole question is as to the person or persons entitled thereto.

The statutes of this State, in respect to insurances upon lives of husbands for the benefit of wives, must now be considered. The first is chapter 80 of the Laws of 1840, section 1, of which made it lawful for a married woman to cause the life of her husband to be insured, and provided that, in case she survived her husband, the amount of the insurance should be

payable to her, to and for her own use, free from the claims of the representatives of her husband or of any of his creditors; but that such exemption should not apply where the amount of premiums annually paid should exceed $300. Section 2 provided that, in case of the death of the wife before the decease of her husband, the amount of the insurance might be made payable after her death to her children for their use, and to their guardian, if under age. It may be assumed that this policy was taken out under that act, and yet it will not aid these appellants.

Section 1 secures the amount of insurance to the wife only, in case she survives her husband. Here she did not survive her husband. There is nothing, therefore, in that section to take away his common law right in the amount insured as survivor. Section 2 confers no right upon the children of Huldah, because the amount of the insurance was not, by the terms of the policy, made payable to them after her death. The statute does not make it payable to them after her death, but simply provides that it may be made payable to them. The subsequent amendments of this chapter make it more certain that this is the proper construction of section 2. The first amendment of the act of 1840 was by Chapter 187 of the Laws of 1858, but that amendment did not touch section 2, and, therefore, has no bearing upon the questions now under consideration. Section 2 was amended in 1862 by chapter 77, and was made to read as follows: "The amount of the insurance may be made payable in case of the death of the wife before the decease of her husband to his or to her children

for their use as shall be provided in the policy of insurance, or to their guardian if under age." Under the section as thus amended, it is clear that the amount of the insurance cannot be claimed by the children of either the wife or the husband unless it is provided in the policy that it shall be payable to them. In 1866, by chapter 656, section 2 was again amended so as to read as follows:

"The amount of insurance may be made payable, in case of the death of the wife before the period at which it became due, to her husband or to his, her or their children for their use as shall be provided in the policy of insurance, and to their guardian, if under age." Here again it is provided that the policy must determine to whom of the persons named payment shall be made. In 1873, by chapter 821, section 2 was again amended, and the section, as amended, provided that a married woman holding a policy for her benefit or for the benefit of herself and her children might surrender such policy to the company issuing the same in the same manner as any other policy; and also provided that in case she had no issue she might dispose of such policy by [317] will or by deed, which disposition should invest such person or persons, to whom the policy had so been bequeathed or granted and conveyed, with the same rights in respect thereto as such married woman would have had in case she survived the person on whose life such policy was issued, and such legatee or grantee should have the same right to dispose of such policy as therein conferred on such married woman.

I can see nothing in all this legislation which gives co*ut*enance to the idea that, by virtue of section 2, as enacted in 1840, the children of Huldah obtained any right in this policy, the insurance not having been made payable to them in any event. If it had been the intention of the law-makers that the amount should be absolutely payable to them, in case of the death of their mother before the decease of her husband, they would have so provided in plain terms, as was done in Massachusetts (Swan v. Snow, 11 Allen, 224), instead of providing that it might be made payable to them.

There was nothing decided in Radie v. Slimmon (26 N. Y. 9) in conflict with any views herein expressed. All that was decided there is that a policy of insurance to a married woman, made under the Laws of 1840, for her benefit and that of her children in case of her death, could not be transferred so as to divest the interest of the wife or of her children. In that case the insurance was upon the life of the husband for the sole use of his wife, and in case of her death before him, for the use of her children. There was nothing in the statute of 1840 which expressly prohibited the assignment of such a policy; but it was held that it would be a violation of the spirit of that act to hold that a wife could sell or traffic with her policy, as though it were realized personal property or an ordinary security for money. It is stated in the opinion of Judge Denio, that that statute looks to a provision for a state of widowhood and for orphan children; and so it does. It provides that a married man may effect an insurance

upon his life for the benefit of his widow, and also for the benefit of his children; but the provision need not be for both unless he chooses to make it so. When the learned judge said that "by the general rules of law a policy on the life of one sustaining only a domestic relationship to the insured would become inoperative by the death of such insured in the lifetime of the *cestui que vie,*" he certainly fell into error, as shown above; and it is clear that he did not feel certain of the proposition thus announced, because he followed it by this language: "Or, if it should be considered as existing for any purpose after that event, it would be for the benefit of the personal representatives of the insured." The latter alternative is sufficiently correct. He says the personal representatives of the insured, not the children. The husband, in the event stated, would be entitled to administration, and would thus become the sole representative of his wife, and, as shown above, the administration would be solely for his benefit in the absence of debts of the wife; and under such circumstances he could release, assign or discharge a policy without administration. In Barry v. Equity Life Assurance Society (59 N. Y. 587) the insurance was again for the benefit of the wife, and in case of her death before her husband, for the benefit of her children; and the decision in the case of Eadie v. Slimmon was simply reaffirmed. [318]

It is said, however, that because the wife could not assign this policy, and because the husband could not control it during her lifetime, in consequence of the statute of 1840, therefore the common-law right of

survivorship to the husband was also destroyed. It is difficult to see how this conclusion follows. The statute went so far, and limited the right of the husband during her life, but it went no further. When Huldah died the statute ceased to operate upon the policy, and then the common-law right of the husband become operative. I know of no principle, and there certainly is no authority holding that the husband must have the right to dispose of his wife's choses in action during her life, in order to reduce them to possession or control them after her death. Ransom v. Nochols *supra.*) So far as the statute interfered with his common-law right in reference to this policy, it was gone. In all other respects his common-law rights remained.

Lester took out this policy, and paid the premiums thereon for about eleven years, to make a provision for his first wife in case she survived him. He then continued the insurance after his second marriage, and paid the premiums for about seventeen years for the purpose of making a provision for his second wife in case she survived him. That there are no rules of law which requires that that purpose shall fail, and that the money paid upon the policy shall be distributed to the adult children of the first wife, to the exclusion of the second wife and her minor child, I think I have sufficiently shown.

The judgment should, therefore, be affirmed, with costs.

FOLGER, Ch. J., ANDREWS and FINCH, JJ., concur; DANFORTH and MILLER, JJ., dissenting; RAPALLO, J., absent at argument.

Judgment affirmed.

The petitioner does not by this stipulation admit that the testimony which it is herein stipulated, the said James H. McIntosh may be considered as having given anything more than an opinion of said James H. McIntosh as to the law of the State of New York on the subject mentioned in such statement, and the matter to which the said James H. McIntosh is to be considered as having testified to, does not admit that the said statement of the law of New York is correct; and does not admit that the case, in the opinion which is recited and set forth in said stipulation, justified such opinion; does not admit that said opinion has not, since the said decision therein, been modified or reversed in any court in said State of New York. [319]

XIX.

That upon the trial of the above-entitled cause, each of the said parties thereto shall have the right to object to any portion of the foregoing stipulation of facts upon the ground if immateriality or irrelevancy and to introduce evidence contradictory thereto or explanatory thereof, and that the Court in deciding said cause may consider this stipulation, and all other testimony, depositions or documents offered by either party in said cause and received in evidence by the Court, and that in the event of any conflict between any statement contained in the fore-

going stipulation and any deposition, document or evidence in said stipulation or between any such statement and any other deposition, document or evidence offered by either party upon the trial of said cause and received in evidence by the Court, the Court may, if it sees fit, disregard any such statement and consider in lieu thereof such other deposition, document or evidence, reserving to the said parties and each of them all rights of objection and exception.

EMMA FORSYTH RUMSEY,
Petitioner Above Named,
By Her Attorneys,
ANDREWS & PITTMAN,
W. B. P.

NEW YORK LIFE INSURANCE COMPANY,
One of the Respondents Above Named,
By Its Attorneys,
THOMPSON & CATHCART.
C.,

BENSON, SMITH & COMPANY, LIMITED,
One of the Respondents Above Named,
By Its Attorneys,
HENRY HOLMES.
C. H. OLSON.
P. R. BARTLETT.

Dated at Honolulu, this 4 day of March, A. D., 1918. [320]

[Endorsed]: Equity—1993. 2/238. Circuit Court, First Circuit, Territory of Hawaii. At Chambers.

In Equity. Emma Forsyth Rumsey, Petitioner, vs. New York Life Insurance Company, a Corporation, and Benson, Smith & Company, Limited, a Corporation, Respondents. Stipulation. 456. Circuit Court, First Circuit. Filed Mar. 5, 1918. At 9 o'clock A. M. B. N. Kahalepuna, Clerk.

No. 1172. Rec'd and filed in the Supreme Court April 11, 1919, at 3:15 o'clock P. M. Robert Parker, Jr., Assistant Clerk. [321]

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

AT CHAMBERS—IN EQUITY.

EMMA FORSYTH RUMSEY,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY and BENSON, SMITH & COMPANY, LIMITED,

Defendants.

Opinion and Decision.

THIS IS A BILL IN EQUITY brought by plaintiff against these two defendants, for the purpose of collecting upon a policy of life insurance heretofore issued by the defendant Insurance Company upon the life of plaintiff's late husband, Samuel L. Rumsey, who died July 27th, 1910, while said policy was regularly in force.

For the purpose of brevity and convenience, the defendant Benson, Smith & Company, Limited, will

herein be referred to as the Drug Company; and the New York Life Insurance Company will be referred to as the Insurance Company.

The material facts in this case are so few and simple that they have been found susceptible of being condensed into a typewritten stipulation consisting of only two hundred and twenty-two pages of legal-cap. Even further condensation may be indulged in, as follows: [322]

The Drug Company was incorporated in 1898. Its business had theretofore been conducted as a private concern owned exclusively by George W. Smith, who, upon its incorporation became, and has ever since remained, and now is, its President and Manager. The amount of its capital stock has been increased from time to time, as business considerations suggested. Mr. Rumsey (herein referred to as the insured), had been an employee of the concern before incorporation, and upon its incorporation he subscribed to its capital stock, and later made further subscriptions, whereby, at the time of the severance of his relations with the Drug Company, in or about 1904, he was the owner of One Hundred Shares, of the par value, (as also of the commercial value), of One Hundred Dollars per share, being an aggregate of Ten Thousand Dollars ($10,000.00). The policy of insurance in question was issued on or about June 11, 1903. At that time, the stock was held as follows: By George W. Smith, 363 shares; by Samuel L. Rumsey, 100 shares; by Alexis J. Gignoux, 30 shares—the remaining seven shares (the initial capitalization having been $50,-

000.00), being held by three or four other parties, in varying amounts, and with whom we are not here concerned.

In 1903, and prior to the application of said policy, it was agreed between said three principal stockholders, that they should mutually insure their lives in the sum of Five Thousand Dollars each, at the expense of the Drug Company, and for its benefit—the Drug Company being named as the beneficiary in each policy. The object of so doing has been somewhat variously set forth in the pleadings, in the depositions of Smith and Gignoux respectively, and in the argument of counsel at the bar. The question whether the Drug Company had an insurable interest in the life of Rumsey has been raised, and constitutes one of the principal questions for decision. The stipulation referred to shows that said Smith was [323] President, Rumsey was Treasurer, and Gignoux was Secretary of the Drug Company corporation, at the time; and it is urged upon the Court that the Drug Company had such insurable interest in the life of Rumsey, because of his relationship to the corporation as its Treasurer, and also because of his being a stockholder therein. All premiums upon the policies were paid by the Drug Company, except that, some years later, the Rumseys, or either of them, also paid two separate premiums to the Insurance Company.

Rumsey's health began to fail soon after the policies in question were taken out, and, whereby he "was compelled to and did cease active connection with the business of the Drug Company, and in the

month of January, 1904, left the Territory of Hawaii, and was never again actively connected with the said Drug Company, or its business and never again returned to the Territory of Hawaii." (Stip. p. 11.)

In February, 1905, Rumsey ceased to hold the office of Treasurer of said Drug Company theretofore held by him, the salary of which ($250.00 per month), had, apparently, been paid to him up to that time. This retirement of Rumsey from the office of Treasurer was effected because it had then "become apparent to him, the said Samuel L. Rumsey, and to said Drug Company, that he, said Samuel L. Rumsey, could not, on account of the condition of his health, ever return to the Territory of Hawaii, or ever again resume active connection with said Drug Company, or its business,"—and thereafter Rumsey drew no salary or compensation whatever from said Drug Company as an officer or employee of said corporation. (Stip. p. 11.)

Rumsey was then living in or about Denver, Colorado. Later, and while so residing, he married the plaintiff herein, and still later transferred to her all of his stock, one hundred shares, in said Drug Company. This stock, in successive amounts, was later sold and transferred by plaintiff to the Drug Company— [324] but these transactions appear immaterial to the present inquiry, and may be dismissed from further consideration.

The policy in question while agreeing to pay (in the event of the death of Rumsey), the sum of Five Thousand Dollars ($5,000) to the Drug Company,

"or its legal representatives, or to such beneficiary as may have been duly designated, at the home office of the Company in the City of New York," also contained a provision whereby the assured might change the beneficiary at any time during the continuance of the policy, "by written notice to the Company at the home office, provided this policy is not then assigned." The policy never was assigned. "No designation, or change of beneficiary, . . . shall take effect until endorsed on this policy by the Company at the home office."

A long correspondence, copied into the stipulation, occurred between Rumsey, and, later, between his wife, the present plaintiff—and the Drug Company, concerning the quality of the treatment which had been accorded to Rumsey by the Drug Company in connection with his being ousted, or dropped from the Treasurership, and its salary, and also concerning the ownership of said policy, and of the rights of the respective parties thereunder; and also concerning the conduct of the business of the Drug Company, and the depletion of Rumseys income by reason of the cessation of his salary, as above, the leanness of, and interruptions in, the annual dividends upon the stock held by Rumsey and also concerning the sale of said stock to the corporation. This correspondence appears to have been conducted, on the part of the Drug Company, through the personalty of Mr. George W. Smith, then, as now, its President and Manager, and I feel impelled to certify that it was conducted by him with admirable poise and temper, and this, in the face of suggestions

and even accusations that were more or less highly provocative in character. In short, if the attitude of the Drug Company toward the Rumseys is to be gauged by the correspondence [325] copied into the stipulation, that corporation is entitled to a certificate of good faith, good intentions, and the utmost courtesy—at least up to the date of the death of Rumsey, in July of 1910. The correspondence in question manifests what appears to have been an honest difference of opinion between the parties as to their respective rights under the policy, with the Drug Company insisting upon its right to be considered the sole owner of all beneficial interest therein and thereunder—and with the Rumseys insisting that even though such beneficial interest had previously existed in the Drug Company, yet, it ceased upon the cessation of the relationship between Rumsey and the Drug Company, and at the point when he was no longer either an officer or an employee of the corporation. The fact that Rumsey continued to hold stock in the corporation may be dismissed, at once, as immaterial to this controversy—as may also be the fact that, after being dropped from the treasurership, he was elected Vice-president of the corporation, and so continued for some years thereafter. There were neither duties nor salary attached to this office, in addition to which fact, Mr. Rumsey was then located several thousand miles from the corporation's place of business.

The physical possession of the policy in question was held, from first to last, by the Drug Company, whereby it became and continued impossible for the

Rumseys to make literal and technical compliance with the provision of the policy itself regarding a change of beneficiary, to wit, that the policy should be forwarded to the home office in New York, and there have the change endorsed upon it. The failure to secure such formal and technical change of beneficiary, and the endorsement thereof on the policy (a change frequently requested by the Rumseys, who were balked in their efforts by the refusal of the Drug Company to deliver the policy for that purpose), has been and is urged as a defense herein by [326] each of the defendants. But this is a Court of Equity, and it is one of the maxims of this branch of jurisprudence that "equity regards that as having been done which should have been done." I therefore regard this point of the defense as being not only highly technical, but utterly unmeritorious, and will consider and decide the case in all respects as though the change of beneficiary had in fact been made in accordance with the express terms of the policy itself. It would be not only inequitable, but intolerable to hold that the Drug Company could, by the mere fact of securing the physical possession of that piece of paper, and withholding it beyond the reach of the Rumseys, defeat the rights of the latter (if any) to effect a change of beneficiary. Such a course of conduct should certainly not be approved by a court of equity.

In addition to consistent and repeated efforts of the Rumseys to secure such technical compliance as above, with the terms of the policy, respecting the endorsement thereon of a change of beneficiary, they

formally and sufficiently notified the Insurance Company, long before the death of the insured, that he had changed the beneficiary in and under the policy, by substituting his wife, the present plaintiff, for the Drug Company. It is true that the Insurance Company replied to this notice, or these notices, to the effect that the change could not be adequately effected except by the manual and physical delivery of the document itself at its home office, for the purpose of having such endorsement made—but this plea was met by full explanation to the Insurance Company of the situation as it existed, and as above described. It is sufficiently obvious that no rights of the Insurance Company, or of any third party, suffered in the slightest degree through the failure, because of their inability as above described, of the Rumseys, to make manual and physical delivery of the policy at the home office of the Insurance Company for said [327] purpose. Therefore, it would be grotesque, in the extreme, to hold that the Insurance Company could avoid or evade any equitable obligation to the plaintiff by virtue of such failure to obtain such endorsement. And it would be equally intolerable, and for the same reason, to hold that the Drug Company could obtain any right as against plaintiff, through the exercise or practice of the wrongful act (if it was wrongful), involved in the withholding from the insured the physical possession of the policy in question, and thereby preventing the consummation of the physical act of the endorsement thereon of a substitution of beneficiary.

There is no lack of authority for this proposition.

An excellent discussion of this principle occurs in Jory v. Supreme Council, etc., 105 Cal. 20, 26, 27. In that case, the beneficiary certificate taken out by a member of a fraternal order had been made payable to her daughter, and delivered into the custody of the latter. The mother later desired (in accordance with the laws of the Order), to substitute her son as beneficiary, in place of the daughter. The daughter refused to deliver the certificate for the purpose of having the transfer made, at the head office of the fraternal Order. The mother fully informed the appropriate officials of the Order of her desire to substitute her son, and of the reasons of her inability to procure the document, as above, but, as in the case at bar, those officials refused to recognize such attempt at substitution, as a real substitution, or to issue a new certificate. The mother died, and the son brought suit to recover the death benefit. The Supreme Court of California, in deciding the case, used the following language, *inter alia:*

> "As between them" (the son and daughter), "there was a substitution of beneficiaries in the eyes of a court of Equity. . . . As between these parties litigant, the Court will administer justice from the standpoint of equity, and bring to the solution of this question, those broad principles upon the basis of which equity always deals. The general rule unquestionably is that a change of a beneficiary [328] cannot be made by the insured unless a substantial compliance with the laws and regulations of the society is had; yet courts of equity have recognized vari-

ous exceptions to this general principle, and the facts of this case bring it squarely within one of the well-recognized exceptions. This exception is builded upon the principle that equity does not demand impossible things, and will consider that done which ought to have been done; and is embraced within the proposition that when the insured complies with all the requirements of the rules for the purpose of making the substitution of beneficiaries, with which he has the power to comply, he has done all that a court of equity demands, . . . Impossibilities are not required, and if the certificate had been lost or destroyed, and thus the surrender made impossible, equity would have treated the surrender as duly made; and in legal effect the certificate was lost in this case. But there is another well-settled principle of equity equally fatal to appellant's claims. No person can take advantage of his own wrongs. No man is allowed to come into a court of equity, and reap beneficial results from his own iniquity. If Mrs. Jory had the right to make the change of beneficiaries, and did all that it was possible for her to do toward making such change, but was prevented by the acts of appellant from a consummation of her intentions, then appellant will not be allowed to derive any benefit from her fraudulent conduct. If a fraud of her own practicing prevented a legal substitution of beneficiaries, then as against her an equitable substitution will be held to have taken place."

A considerable number of cases, cited by the California court in support of its conclusions as above quoted, have been examined, and among them one, also closely resembling, in its circumstances the case at bar, as regards the attempts to make, and the obstacles to the making, of a change of beneficiaries. This case is Marsh v. American Legion of Honor, 149 Mass. 512, 518, 519. In that case the member had made his wife the original beneficiary, but having concluded to substitute his mother as beneficiary, he took the steps necessary to that end, by depositing with the secretary of the subordinate council to which he belonged, the petition, (addressed to the supreme council), for such substitution, and left it with said secretary to be sealed, attested, and forwarded to the supreme council. But said secretary, acting in collusion with the wife of the member, (the original beneficiary), wilfully failed and neglected either to seal or attest the document as provided by the laws of the order, and, it having been forwarded to the supreme council in this imperfect condition, the supreme [329] secretary, acting within the scope of his official power, waived both the sealing and the attestation. The member died, and his mother brought suit to collect. The member's widow (the original beneficiary), contested the mother's claim, and urged the technical failure to procure a substitution of beneficiaries according to the rules of the order, as above explained. But the Court (pp. 518, 519), brushed aside that defense, in the following language:

"Deficiencies in the performance of the details provided for the transmission of a document were unimportant, when the officer to whom it was addressed was satisfied of its authenticity. Everything that Marsh was to do, or could do, to effect the designation in favor of his mother, had been done. He could not be responsible for the failure of the subordinate secretary to affix the seal, attest the petition, or forward the benefit certificate. It is found that the change was not made by reason of the fraudulent acts of the subordinate secretary and Emeline S. Marsh" (the widow and original beneficiary), "and would have been made by the defendant corporation if it had received the benefit certificate. If Walter H. Marsh had a right to make this change, and could and would have made it but for the fraudulent conduct of Emeline S. Marsh acting in collusion with an officer of the defendant corporation, she certainly cannot thereby have entitled herself to the amount of the benefit fund which she has demanded."

This brings us to a consideration of the question whether the act of the Drug Company in so withholding the policy from the insured, was, in law, or in equity, a wrongful act? And this, in turn, involves the further question as to the existence of an insurable interest on the part of the Drug Company in the life of Samuel L. Rumsey,—either at the date of the application for, and issuance of the policy,—or, if such interest existed at either of those dates, then, the further question, whether it continued to exist

after the severance of the official relations of Rumsey to the Drug Company corporation? The purpose lying at the root of the action of the Drug Company in taking out this policy, as well as the taking of the policies on the lives of Messrs. Smith and Gignoux, may here be appropriately discussed. It is true that the stipulation declares such purpose to have been,—"for the purpose [330] of protecting the interests of said Benson, Smith & Company, Limited, in the event of the death of any of the said Samuel L. Rumsey, George W. Smith, and Alexis J. Gignoux, officers, directors and stockholders as aforesaid."

The stipulation provides (p. 222) that the Court may find, if the correspondence, depositions, and other contents of the stipulation so warrant, a different state of facts from those set forth in the stipulation itself. Availing myself of this latitude, I now inquire whether the passage in the stipulation, last above quoted, correctly states the fact respecting the purpose of the Drug Company in taking out the several policies indicated.

Upon the argument, counsel for the Drug Company insisted that the real, if not the sole purpose involved, was, (with respect to the Rumsey policy, for example), to give the Drug Company in the event of the death of Rumsey, a "head-start" over possible competitors for the purchase of the Rumsey stock, in the form of a fund of Five Thousand Dollars. It has been insisted throughout that the Drug Company was and is a "close corporation," allowing no "outsiders," nor any persons except such as should pass muster before the remaining stockholders, to acquire

stock therein. Involved in this was the further purpose to prevent their stock being acquired by competitors or enemies of the concern, whereby their books might be examined, to their possible prejudice. And therefore, it was deemed desirable to provide a fund that would at least give the corporation such "head-start," in the effort to purchase the stock of a deceased stockholder, even though such fund should not be sufficient to pay for all of it. The great inequality in the number of shares owned by the three leading stockholders respectively, (Smith, 363; Rumsey, 100; Gignoux, 30), might have suggested the wisdom of graduating the amount of insurance [331] upon each life in some proportion to the stock held by each,—instead of which course, a uniform sum of Five Thousand Dollars each was determined upon. It will thus be seen that such sum would have paid for the Gignoux stock at par, and would have left a forty per cent balance; would have paid for only one-half of the Rumsey stock, and would have paid for a comparatively trifling proportion of the Smith stock. Some materiality attaches to this phase of the case, in support of the conclusion at which I have arrived with respect to it, namely, that this entire series of transactions constituted what, in law, are known as wagering contracts,—and that the real purpose of the corporation in taking out the insurance in question, when stripped of verbiage and euphonious diction, was merely to speculate upon the lives of the three principal stockholders in the corporation. And this I find, in contradiction of the purpose stated in the stipulation, but within the latitude allowed to me

thereby, to have been the real and ultimate purpose of the corporation in so insuring the lives of its three officers as above.

I find support for this conclusion in the correspondence and depositions referred to. The right of the Drug Company to hold, or even to take such insurance having been questioned by Rumsey, (Stip., p. 33) in the course of a letter asking for "an equitable settlement of the insurance policy on his life," and in which he held that the corporation had then no interest in his life to sustain its course in carrying the policy—"although it might have done so while I was actually connected with the Company as an officer,"—the Drug Company replied, (Stip., p. 37), contending that—"the corporation has a right to hold the policy on your life, on the life of the President of the United States, the Emperor of Germany, or any other person. . . . This is a fact that is often made use of by speculators." [332]

In his deposition, (answer to direct interrogatory No. 15, Stip. p. 75), Mr. Smith testifies that he desired that such policies as above should be taken out in favor of the Drug Company, "in order that the corporation, which was a close corporation, might be protected in the event of the death of any of its officers. . . . The purpose of such insurance was to provide the company with funds, so that, in the event of any such death, it could purchase the stock of the deceased, and thus prevent the stock going on the open market."

Mr. Gignoux, answering direct interrogatory 7, (Stip. p. 86), testifies that Mr. Smith, (President and Manager) stated to us "that his reasons for wishing us to do so, (take out policies), were in order to protect the Drug Company in case of the death of any of us, so that the firm would be in a position to purchase the stock of each of us so dying, thereby carrying out the policy of the Company to remain a close corporation, and thus preventing outsiders and competitors from becoming stockholders in the corporation."

The Drug Company, in a letter to the Insurance Company, Sept. 13, 1910, after the death of Rumsey, (Stip. p. 159), reasserted its claim to the beneficial interest in the policy, stating that "the insurance was effected on account of our interest in Mr. Rumsey's life as an officer and stockholder in our Company, and also to provide means to take up his stock in case of his death."

As early as Jan. 22, 1907, (Stip. p. 23), the Drug Company, in writing to Mr. Rumsey, suggested that the policy in question "could be assigned to you by the firm after the payments for all your stock have been made, and on the repayment to the firm of the amounts expended for annual premiums, that is, if you should so desire it. The policy could then be placed for the benefit of your wife." Mr. Rumsey replied to the above, suggesting certain concessions [333] in regard to the amount which he should pay on account of premiums already paid by the Drug Company, and on April 11, 1907 (Stip. p. 26), the

Drug Company responded to that suggestion, using the following language, *inter alia,*—"As a matter of fact, the business would refer to carry the policy *as an investment.*" (Italics mine.)

> "The object of this insurance was to protect the corporation against a sudden demand for funds in the event of the death of any of the principal stockholders."
>
> Smith to Rumsey, Sept. 25, 1907; Stip. p. 36.

But it would serve no good purpose to quote further from the Stipulation, or the depositions or correspondence therein contained, in support of the conclusion above announced. It is manifest to my mind that the entire transaction involved in the taking out of the three policies referred to, notwithstanding all attempted linguistic disguises, was nothing more or less than a series of wagering contracts wherein and whereby the Drug Company undertook to speculate upon the lives of its three principal stockholders. No other conclusion appears possible in view of the purpose, so often and so variously repeated, that the corporation so acted in order to provide itself with a fund wherewith to pay in whole, or in part, for the stock of any of those gentlemen who should be called by death. If such a transaction does not constitute a gambling upon the lives of those insured, then I am at a loss to conceive what would constitute such a condition. It was a commercial proposition, pure and simple, whereby the Drug Company undertook to advance certain premiums with the prospect and expectation of reaping financial profits in the event of the death of any of its three principal stockholders

whose lives were covered by said policies respectively. And such transactions are forbidden by law, as being contrary to public policy, unless there be what the law describes as "an insurable interest," on the part of [334] the insurer in the life of the insured. Let us further consider whether there was, in the instant case, any "insurable interest" on the part of the Drug Company in the life of Rumsey, at the time of applying for, and taking out the policy upon his life?

The eminent Justice Field, late of the Supreme Court of the United States, in writing the opinion of that court in Warnock v. Davis, 104 U. S. 775, 26 Law Ed. 924, 926, makes use of the following language:

> "It is not easy to define with precision what will in all cases constitute an insurable interest, so as to take the contract out of the class of wager policies. It may be stated generally, however, to be such an interest, arising from the relations of the party obtaining the insurance, either as creditor of or surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life. It is not necessary that the expectation of advantage or benefit should be always capable of pecuniary estimation; for a parent has an insurable interest in the life of his child, and a child in the life of his parent, a husband in the life of his wife, and a wife in the life of her husband. The natural affection in cases of this kind is considered

as more powerful; as operating more efficaciously—to protect the life of the insured than any other consideration. But in all cases there must be a reasonable ground, founded upon the relations of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit, or advantage from the continuance of the life of the assured. Otherwise the contract is a mere wager, by which the party taking the policy is directly interested in the early death of the assured. Such policies have a tendency to create a desire for the event. They are, therefore, independently of any statute on the subject, condemned, as being against public policy."

In the instant case, we see no similarity to any of the features above recited as those which are generally included within the term "insurable interest." There is nothing in the Stipulation, or elsewhere in the record, to show that Rumsey was indebted to the Drug Company, or that the policy on his life was taken to secure any such indebtedness; neither that he bore any relation of especial or peculiar trust, confidence or utility to the corporation; neither that the services then being performed by him for the corporation were of a character which could not [335] conveniently be performed by any reasonably competent person. On the contrary, it is shown that very soon after the policy in question was issued, and owing to a rapid failure of his health, Mr. Rumsey left this territory and never thereafater returned,—and that there was no difficulty, inconvenience or embarrassment in filling his place as Treasurer, is abun-

antly shown by the record. These facts would appear to dispose of the contention of counsel for the Drug Company, to the effect that there was something inherent in Rumsey's relationship to that corporation in his capacity as Treasurer, which gave the corporation an insurable interest in his life. In support of this contention they cite Mutual Life Ins. Co. v. Board Armstrong & Co., a case in the Supreme Court of Appeals of Virginia, reported in 80 S. E., at 565. In that case, the Court held that the corporation had an insurable interest in the life of its President, General Manager and principal incorporator, "whose relation to, and knowledge of, its financial and manufacturing interests were such that his death could not fail to result in serious and substantial loss to its creditors, and others interested in its prosperity, and hence, where a policy on his life for its benefit, was a bona fide transaction, consummated with an honest purpose of protecting the corporation against loss in the event of his death, it was not obnoxious to public policy." Without any disposition to quarrel with the conclusion so announced by the Virginia Court, it will be sufficient comment upon that decision to remark that it is quite inapplicable to the case now before the court, because of the widely differing character of the facts involved in the two cases.

Citation of decisions has also been made by counsel for the Drug Company, to the effect that a partnership may have an insurable interest in the life of one of the partners,—as may also one or more of the partners in the life of another. Apart from [336]

the fact that the Drug Company was not, during any of the time covered by this controversy, a partnership, and that for said reason such citations are beside the mark, it may be observed that none of the elements which enter into the creation of such insurable interest, in the case of a partnership, or of a partner therein, existed in the instant case. A very considerable volume of litigation with reference to the insurable interest of partners and partnerships in the lives of their partners and members of their firm, is reported in the books. There was a great outcropping of such decisions on the part of the Courts of the Eastern States in the years following the discovery of gold in California. As a result of the stampede from all parts of the world, (including those Eastern States), to the gold mines, many partnerships and associations were organized for the purpose of "staking" or equipping one or more members thereof, usually at the expense of the others, to proceed to California and there enter the lists with the fickle goddess of fortune, with provisos for a division of the profits which might result from such enterprise. And, as a means of insuring themselves against loss for such advances, the partners or associations remaining at home in many instances took out policies of life insurance upon the young argonauts who were thus sent to the mines. It is not surprising that many of the latter were called to their last account while in the Golden State, or on their way thither or returning—or that litigation should have arisen between the beneficiaries named in some of those policies and the Insurance Companies by whom, respec-

tively, they were issued. And I believe that in virtually all of the reported decisions in such cases, the courts upheld the policies, as resting upon an insurable interest in those whose partners or members had been so insured, and had died while the policies were in effect. The following cases will serve to illustrate [337] the conditions in decisions last above referred to: Morrell v. Insurance Co., 10 Cush. 282; Insurance Co. v. Johnson, 4 Zab. (N. J.) 576; Bevin v. Insurance Co., 23 Conn. 244.

Reliance seems to be placed by counsel for the Drug Company upon the decision of the United States Supreme Court in Conn. Mut. Life Ins. Co. v. Luchs, 108 U. S. 498; 27 Law Ed. 800. That was a partnership case, and the court sustained the right of Luchs, one of the partners, to recover upon a policy which he took out upon the life of Dillenberg, and the following language occurs in the course of the opinion, (27 Law Ed. p. 802);

> "Certainly Luchs had a pecuniary interest in the life of Dillenberg on two grounds: Because he was his creditor and because he was his partner. The continuance of the partnership, and, of course, a continuance of Dillenberg's life, furnished a reasonable expectation of advantage to himself. It was in the expectation of such advantage that the partnership was formed and, of course, for the like expectation, was continued."

But the Court laid stress upon the fact (p. 803) that Luchs "did not procure the policy for any purpose of speculating upon the duration of the life of Dillenberg."

But it is contended, on behalf of plaintiff, that even though there may have been an insurable interest on the part of the Drug Company in the life of Rumsey, while the latter was connected with the corporation as its treasurer,—yet, when his official relationship to the corporation ceased, such insurable interest ceased with it, and that there was no authority in the Drug Company thereafter to continue as the beneficiary of said policy. As above, I am not disposed to concede that there was, at any time, such insurable interest on the part of the corporation in the life of Rumsey. But even though I have erred in this conclusion, I am definitely of the opinion that such interest, (if theretofore existing), was extinguished by the dissolution of [338] Rumsey's relationship to the corporation as an active officer thereof, and participant in its business. It is true, as stated above, that Rumsey was elected to the somewhat ornamental position of vice-president of the corporation, after being displaced as treasurer,—but the record shows that the office of vice-president was created after Rumsey left the territory, never to return, and also that he never, after leaving the territory, in anywise participated in the business concerns of the corporation. It would be idle, therefore, to claim that any insurable interest which might possibly have theretofore existed in his life, and in favor of the corporation, survived the dissolution of his active relationship to the corporation, merely by grace of the ornamental or complimentary title of vice-president having been bestowed upon him while he was residing at a distance of thirty-five hundred miles from the scene of the

corporation's activities, and taking no part or share whatsoever in the direction or conduct of its business affairs. It would therefore follow that after such dissolution of Rumsey's relationship to the corporation, Rumsey became and continued the equitable beneficiary of the policy in question, and that the Drug Company thereafter held it as his trustee; and that, from and after the receipt by the Insurance Company of the notification by Rumsey that he desired to substitute, and had substituted his wife as beneficiary under said policy, (together with an explanation of the reasons, as above, why it was impossible for him to deliver the manual and physical custody of the policy itself for formal endorsement of such change of beneficiary),—the Drug Company thence forward held said policy as trustee for the present plaintiff, she being the beneficiary so equitably substituted by Rumsey in place of the Drug Company. [339]

Counsel for the Drug Company, in their brief, suggest that there had been an assignment of the policy to the corporation. This may be disposed of at once by a simple negation. The policy was never assigned, either by Rumsey, or by his wife.

Laches on the part of the plaintiff is also alleged by counsel for the Drug Company as a reason why she should not prevail here, it being claimed that she allowed more than six years to elapse between the date, (August 30, 1907), when her husband demanded delivery of the policy by the Drug Company, and the bringing of the present suit. I find no merit in this contention. Her claim does not rest upon the

question of the physical whereabouts of the piece of paper whereon the policy of insurance is printed or written. I have held, as above, that the action of Rumsey, as herein described, in his efforts to obtain a substitution of beneficiary under the policy, constituted, became and was, and thereafter continued an equitable substitution, as effective in all respects for the purposes of the present suit, as though the policy had been forwarded to the home office in New York, and the substitution physically endorsed thereon. There is no question of replevin, or the right to replevy, involved in this case. The fact that the particular piece of paper involved reposed in the safe of the Drug Company instead of having been delivered to Rumsey, or his wife, does not affect in the slighest Rumsey, or his wife, does not affect in the slighest degree her right of recovery herein. The Statute of Limitations is not involved.

This brings us to a further recital of the history of this controversy. Mr. Rumsey having died July 27, 1910, his widow, (the present plaintiff), duly forwarded to the Insurance Company at its home office, formal proofs of his death, and demanded the payment of the policy, which was refused. She thereupon brought [340] suit against the Insurance Company in the District Court of the City and County of Denver, State of Colorado, August 15, 1910. Upon said action being brought to trial in said district court, a Nonsuit was granted, and the matter was carried to the Supreme Court of the State of Colorado for review. Said Supreme Court, in January, 1915, rendered its decision affirming the

judgment of said district court. In its opinion, the said Supreme Court held, *inter alia,* that the decision of plaintiff's claim involved matters in controversy between said plaintiff and said Drug Company and that, because of said Drug Company not being a party to said action in the Colorado Court, it was impossible for said Colorado court to adjudicate said controversy. It should be here noted that the attitude of the Insurance Company, throughout this entire controversy, has been one of "benevolent neutrality." This company has apparently been willing to accommodate the Rumseys in the matter of the substitution of the beneficiary, but based its refusal of such substitution solely upon the ground that the original policy had not been sent to its home office to be there endorsed, as above described. Upon being sued in Colorado, the Insurance Company endeavored to procure the appearance and intervention in said action of the Drug Company, in order that the controversy might then and there be fully contested between the really interested parties,—the Insurance Company itself being willing to pay the amount of the policy to whomsoever the court should decide was entitled thereto. But the Drug Company refused to litigate in Colorado.

Following the decision of the Supreme Court of Colorado, the Drug Company brought suit upon said policy, against the Insurance Company, in this court. The Insurance Company answered setting up, in substance, the history of the Colorado litigation, and asking that the present plaintiff be made a party to the action. [341] A trial was had in this court,

jury waived, but no evidence was introduced on behalf of the defendant Insurance Company, to substantiate any of the allegations of the answer. It is true that a number of letters and other documents were "filed for identification" which, if they had been regularly introduced and read in evidence, might have had the effect of procuring an order to bring in the present plaintiff as a party to the action, —though such a result may be considered as at least doubtful. Judgment passed in favor of the Drug Company for the full amount of the policy and interest, and that judgment has been paid.

I am disposed to regard the action of the Drug Company against the Insurance Company, so prosecuted to judgment in this court, as having been a collusive action. Although it was alleged in the answer of the defendant therein that the present plaintiff then was, as she had theretofore been, and has ever since continued, a claimant to the amount represented by the policy, yet no actual proof of those facts was adduced or offered, and nothing in effect appears to have been shown to the court except the policy itself, continuous payment of premiums by the Drug Company, and the death of Rumsey, whereby, upon the face of the record, as thus exhibited, the Drug Company became and was entitled to judgment.

But all parties concerned then well knew that this plaintiff was a claimant to the fund represented by said policy, and it is impossible to avoid the conclusion that the Drug Company, in particular, (the Insurance Company, as above suggested, being unconcerned in the result, further than to obtain a judg-

ment which might operate as a warrant to pay the amount of the policy to the Drug Company), sedously and inequitably avoided any and all action which might have resulted in the intervention of the present plaintiff as a party to said action. [342]

As to the facts, I find them to be as set forth in the Stipulation referred to, except as herein otherwise expressly found and declared.

As to the law, I find the plaintiff entitled to recover the principal amount represented by said policy, together with interest thereon at eight per cent (8%) per annum, computed from the date of the furnishing by the present plaintiff of the proofs of death of said Samuel L. Rumsey to the defendant Insurance Company, at its home office in New York. This date is shown to have been August 15, 1910. (Stip. p. 151.)

The decree herein will be absolute, for the amount of the principal of said policy, and such interest as aforesaid, together with the costs of this action, as against the defendant Insurance Company. And, as against the Drug Company, the Court finds that in receiving and retaining the proceeds of said judgment so rendered by this Court in said action of said Drug Company against said Insurance Company, said Drug Company acted as the Trustee of, and for the plaintiff herein, and must account to, and pay over to her, the amount so received by it on account of the principal and interest then represented by said policy and said judgment, together with interest upon the aggregate thereof, at the rate of eight per cent (8%) per annum from the date of its payment by said Insurance Company to said Drug Company, to the date

of such decree. There will be deducted, however, from such aggregate as aforesaid, the aggregate of the sums paid by said Drug Company to said Insurance Company as premiums upon the policy herein sued upon, together with interest upon said payments of premiums respectively, from the dates upon which they were respectively made, to the date of the decree. Of course, plaintiff [343] may not collect from both defendants. The Drug Company, as her trustee, is primarily liable for the aggregate above described, as payable by it. Upon payment thereof, should any balance remain, such balance may be collected from the defendant Insurance Company. The decree for costs will run against each and both of the defendants.

A decree to this effect will be signed upon presentation, provided, however, that either party may be further heard as to the terms of such decree, if either party shall conceive the terms above outlined to be inappropriate in view of the facts and the law as herein found.

Dated this 5th day of March, 1919.

[Circuit Court Seal]

(S.) C. W. ASHFORD,
First Judge.

[Endorsed]: Equity No. 1993. Reg. 2, pg. 242. Circuit Court, First Circuit, Territory of Hawaii. At Chambers. In Equity. Emma Forsyth Rumsey, Plaintiff, vs. New York Life Insurance Company, and Benson, Smith & Company, Limited, Respondents, Opinion and Decision. 33/143 Circuit Court, First Circuit. Filed Mar. 5, 1919, at 3:30 o'clock P. M.

(S.) B. N. Kahalepuna, Clerk. C. W. Ashford, First Judge. [344]

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

AT CHAMBERS—IN EQUITY.

EMMA FORSYTH RUMSEY,

Petitioner,

vs.

NEW YORK LIFE INSURANCE COMPANY, a Corporation, and BENSON, SMITH & COMPANY, LIMITED, a Corporation,

Respondents.

Decree.

This cause coming on regularly before me, the Honorable C. W. Ashford, First Judge of the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, sitting at Chambers, in Equity, on the 26th day of August, 1918, for trial and final disposition, and Messrs. Andrews & Pittman appearing for petitioner, Emma Forsyth Rumsey, and Messrs. Thompson & Cathcart, appearing for respondent New York Life Insurance Company, and Messrs. Robertson & Olson appearing for respondent Benson, Smith & Company, Limited, and the Court having heard the evidence and arguments of counsel and having made and filed its findings of fact and conclusions of law herein; NOW, THEREFORE, in consideration of the law and the premises, and in accordance with said findings of fact and conclusions of law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That petitioner do have and recover of and from respondent New York Life Insurance Company the sum of Five [345] Thousand Dollars ($5,000.00), with interest thereon at eight per cent (8%) per annum from the 15th day of August, 1910, to date, amounting to the sum of Three Thousand Four Hundred Forty-five & 36/100 Dollars ($3,445.-36), together with petitioner's costs and disbursements incurred in this action, amounting to the sum of $45.50/100.

2. That respondent Benson, Smith & Company, Limited, acted as trustee for petitioner in receiving and retaining the sum of Five Thousand Nine Hundred Fifty-nine & 55/100 Dollars ($5,959.55), the proceeds of a judgment rendered and entered in the above-entitled court on the 8th day of February, A. D. 1913, in an action entitled: "Benson, Smith & Company, Limited, an Hawaiian corporation, Plaintiff, vs. New York Life Insurance Company, a corporation, Defendant," in favor of Benson, Smith & Company, Limited, respondent herein, and against New York Life Insurance Company, respondent herein, which judgment was paid on the 3d day of April, A. D. 1913, and that said Benson, Smith & Company, Limited, holds said sum of money as trustee for petitioner.

3. That petitioner have and recover of and from respondent Benson, Smith & Company, Limited, said sum of Five Thousand Nine Hundred Fifty-nine & 55/100 Dollars ($5,959.55), with interest at the rate

of eight per centum (8%) per annum from the 3d day of April, A. D. 1913, to date, amounting to the sum of Two Thousand Eight Hundred Fifty-one & 20/100 Dollars ($2,851.20), less the sum of One Thousand Eight Hundred Fifty-eight & 40/100 Dollars ($1,858.40), being the amount of the premiums paid by said respondent Benson, Smith & Company, Limited, on the life insurance policy of Samuel L. Rumsey, deceased, the policy upon which said sum of money was collected by a judgment in favor of respondent Benson, Smith & Company, Limited, as aforesaid, together with [346] interest at the rate of eight per centum (8%) per annum on said premium sums paid by respondent Benson, Smith & Company, Limited, from the date of the payment of the same to date, amounting to the sum of One Thousand Eight Hundred Twenty-seven & 23/100 Dollars ($1,827.23), leaving a balance of Five Thousand One Hundred Twenty-four & 92/100 Dollars ($5,124.92), together with petitioner's costs and disbursements incurred in this action, amounting to $45 50/100.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that petitioner shall first proceed to collect on her judgment herein against respondent Benson, Smith & Company, Limited, and, if petitioner is unable to collect the full judgment herein rendered in her favor against respondent Benson, Smith & Company, Limited, petitioner may proceed to collect any sum remaining due and unpaid on the judgment rendered herein against respondent Benson, Smith & Company, Limited, as shown by the unsatisfied return on the execution levied on said

judgment against respondent Benson, Smith & Company, Limited, from respondent New York Life Insurance Company upon the judgment rendered herein against said respondent New York Life Insurance Company or, in the event that petitioner is unable to collect any part of her judgment against Benson, Smith & Company, Limited, herein she may proceed to collect from respondent New York Life Insurance Company the full amount of the judgment rendered herein in her favor against respondent New York Life Insurance Company.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that petitioner cannot collect on the judgments herein against both respondents, except as hereinabove provided. The payment in full of the judgment herein against respondent Benson, Smith & Company, Limited, shall constitute a full release of the judgment herein [347] of petitioner against respondent New York Life Insurance Company.

Done at chambers, this 2d day of April, A. D. 1919.

[Circuit Court Seal]

(S.) C. W. ASHFORD,

First Judge, First Circuit Court, Territory of Hawaii, Sitting at Chambers, in Equity.

O. K. as to form.

(S.) ROBERTSON & OLSON,

Attorneys for Benson, Smith & Co., Ltd.

(S.) THOMPSON & CATHCART,

RAV.

[Endorsement]: E. No. 1993. Reg. 2, pg. 241. Circuit Court, First Circuit, Territory of Hawaii.

Emma Forsyth Rumsey, Petitioner, vs. New York Life Insurance Company, a Corporation et al., Respondents. Decree. 33/143. Filed April 2, 1919, at 45 minutes past 2 o'clock P. M. (S.) Sibyl Davis, Clerk. Andrews & Pittman, 37 Merchant Street, Honolulu, T. H., Attorneys for Petitioner. [348]

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

AT CHAMBERS—IN EQUITY.

EMMA FORSYTH RUMSEY,

Petitioner,

vs.

NEW YORK LIFE INSURANCE COMPANY, a Corporation, and BENSON, SMITH & COMPANY, LIMITED, a Corporation,

Respondents.

Notice of Appeal.

Now come New York Life Insurance Company, a corporation, and Benson, Smith & Company, Limited, respondents herein, and hereby give notice of their, and each of their, intention to appeal, and they do and each of them doth, hereby appeal to the Supreme Court of the Territory of Hawaii from the decree made and entered in the above-entitled cause on the 2d day of April, 1919, by the Honorable C. W. Ashford, First Judge of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, sitting at Chambers, in equity, in said cause.

Dated, Honolulu, T. H., April 3d, A. D. 1919.

NEW YORK LIFE INSURANCE COMPANY,

By Its Attorneys,
THOMPSON & CATHCART.
F. E. T.

BENSON, SMITH & COMPANY, LIMITED,

By Its Attorneys,
ROBERTSON & OLSON.

Receipt of a copy acknowledged.

ANDREWS & PITTMAN,
Attorneys for Petitioner.

[Endorsement]: E. 1993. 2/241. Circuit Court, First Circuit, Territory of Hawaii. At Chambers. In Equity. Emma Forsyth Rumsey, Petitioner, vs. New York Life Insurance Company, a Corporation, and Benson, Smith & Company, Limited, a Corporation, Respondents. Notice of Appeal. Circuit Court, First Circuit. Filed Apr. 4, 1919, at 10:40 o'clock A. M. Sibyl Davis, Clerk. Robertson & Olson, 863 Kaahumanu Street, Honolulu, T. H., Attorneys for Respondents.

No. 1172. Rec'd and Filed in the Supreme Court, April 14, 1919, at 9:30 o'clock A. M. Robert Parker, Jr., Assistant Clerk. [349]

In the Supreme Court of the Territory of Hawaii.

October, 1918, Term.

APPEAL FROM CIRCUIT COURT JUDGE, FIRST CIRCUIT.

EMMA FORSYTH RUMSEY,
Petitioner–Appellee,

vs.

NEW YORK LIFE INSURANCE COMPANY, a Corporation, and BENSON, SMITH & COMPANY, LIMITED, a Corporation.
Respondents–Appellants.

Stipulation That Stipulation as to Agreed Facts be Included in Record Transmitted to Supreme Court.

IT IS HEREBY STIPULATED AND AGREED by and between the parties in the above-entitled cause that upon the appeal to the above-entitled court of the New York Life Insurance Company and Benson, Smith & Company, Limited, from the decree made and entered in said cause by the Honorable C. W. Ashford, First Judge of the Circuit Court of the First Judicial Circuit sitting at Chambers In Equity, on the 2d day of April, 1919, there may be included in and as part of the record transmitted to the above-entitled court, the original stipulation as to agreed facts in said cause, entered into by the parties to said cause, and dated the 4th day of March, 1918.

Dated, April 5th, 1919.

NEW YORK LIFE INSURANCE COMPANY,

By Its Attorneys,

THOMPSON & CATHCART.

RAV,

BENSON, SMITH & COMPANY, LIMITED,

By Its Attorneys,

ROBERTSON & OLSON.

EMMA FORSYTH RUMSEY,

By Her Attorneys,

ANDREWS & PITTMAN.

W. B. PITTMAN.

[Endorsement]: Supreme Court, Territory of Hawaii. October, 1918, Term. Emma Forsyth Rumsey, Petitioner-Appellee, vs. New York Life Insurance Company, a Corporation, and Benson, Smith & Company, Limited, a Corporation, Respondents-Appellants. Stipulation. Rec'd and filed in the Supreme Court, April 5, 1919, at 11:05 o'clock A. M. Robert Parker, Jr., Assistant Clerk. Robertson & Olson, 863 Kaahumanu Street, Honolulu, T. H., Attorneys for Benson, Smith & Co., Ltd. [350]

In the Supreme Court of the Territory of Hawaii.

October, 1918, Term.

APPEAL FROM CIRCUIT COURT JUDGE, FIRST CIRCUIT.

EMMA FORSYTH RUMSEY,
Petitioner–Appellee,

vs.

NEW YORK LIFE INSURANCE COMPANY, a Corporation, and BENSON, SMITH & COMPANY, LIMITED, a Corporation,
Respondents–Appellants.

Order That Stipulation as to Agreed Facts be Included in Record Transmitted to Supreme Court.

UPON THE STIPULATION filed herein by the parties in the above-entitled cause, and good cause appearing therefor, it is hereby ordered that upon the appeal to this court by the said New York Life Insurance Company and Benson, Smith & Company, Limited, from the decree made and entered in said cause by the Honorable C. W. Ashford, First Judge of the Circuit Court of the First Judicial Circuit, sitting at Chambers, in Equity, on the 2d day of April, 1919, there may be included in and as part of the record to be transmitted to this court the original stipulation as to agreed facts in said cause entered into by the parties to said cause and dated the 4th day of March, 1918.

Dated, April 5th, 1919.

JAMES L. COKE,
Chief Justice, Supreme Court, Territory of Hawaii.

[Endorsement]: Supreme Court, Territory of Hawaii. October, 1918, Term. Emma Forsyth Rumsey, Petitioner-Appellee, vs. New York Life Insurance Company, a Corporation, et al., Respondents-Appellants. Order. Rec'd and Filed in the Supreme Court, April 5, 1919, at 11:05 o'clock A. M. Robert Parker, Jr., Assistant Clerk. Robertson & Olson, 863 Kaahumanu Street, Honolulu, T. H., Attorneys for Benson, Smith & Co., Ltd. [351]

In the Supreme Court of the Territory of Hawaii.

October Term, 1918.

No. 1172.

EMMA FORSYTH RUMSEY

vs.

NEW YORK LIFE INSURANCE COMPANY AND BENSON SMITH & COMPANY, LIMITED.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

HON. C. W. ASHFORD, JUDGE.

Opinion.

Submitted September 17, 1919.

Decided October 1, 1919.

KEMP and EDINGS, JJ., and Circuit Judge DE BOLT in Place of COKE, C. J., Absent.

Insurance—beneficiary—insurable interest.

Where there are no ties of blood or marriage be-

tween the person whose life is insured and the person who procures the policy on such life there must be some pecuniary interest of the latter in the life of the former to sustain the insurance. But an indirect advantage is sufficient. It is enough that in the ordinary course of events pecuniary loss or disadvantage will naturally and probably result from the death of the one whose life is insured to the person obtaining the policy. [352]

Opinion of the Court by EDINGS, J.

This is an appeal by the respondents New York Life Insurance Company and Benson, Smith & Company, Limited, from a decree entered in favor of the petitioner-appellee, Emma Forsyth Rumsey, finding that the said Emma Forsyth Rumsey "do have and recover of and from respondent New York Life Insurance Company the sum of Five Thousand Dollars ($5,000.00), with interest thereon at eight per cent (8%) per annum from the 15th day of August, 1910, to date. * * * That respondent Benson, Smith & Company, Limited, acted as trustee for petitioner in receiving and retaining the sum of five thousand nine hundred fifty-nine & 55/100 dollars ($5959.55), the proceeds of a judgment rendered and entered in the above-entitled court on the 8th day of February, A. D. 1913, in an action entitled: 'Benson, Smith & Company, Limited, an Hawaiian corporation, plaintiff, vs. New York Life Insurance Company, a corporation defendant,' in favor of Benson, Smith & Company, Limited, respondent herein, and against New York Life Insurance Company, respondent

herein, which judgment was paid on the 3rd day of April, A. D. 1913, and that said Benson, Smith & Company, Limited, holds said sum of money as trustee for petitioner'' and must account, and pay over to her said sum less the sum paid by said Benson, Smith & Company to the New York Life Insurance Company as premiums on said policy.

The case was tried upon an agreed statement of facts, the parties stipulating that the same should be considered the evidence in the suit, provided that the Court should have the right to disregard the stipulation where it found the testimony and depositions were in conflict with the same.

The record before this Court discloses, among other things, the following facts: The petitioner instituted a suit [353] in equity against the two respondents for the purpose of collecting the principal upon a policy of life insurance heretofore issued by the respondent New York Life Insurance Company upon the life of petitioner's late husband, Samuel L. Rumsey, who died July 17, 1910, while said policy was in full force. Benson, Smith & Company, Limited, was incorporated in 1898. The business had theretofore been conducted as a private enterprise owned exclusively by George W. Smith, who upon its incorporation became, and has ever since remained, its president and manager. Samuel L. Rumsey had been an employee of the concern before its incorporation and upon its incorporation he subscribed to its capital stock, and later made further subscriptions, whereby at the time of the severance of his relations with Benson, Smith & Company, Limited, in 1904,

he was the owner of one hundred shares of the capital stock of said corporation of the par value of one hundred dollars per share. The policy of insurance in question was issued June 11, 1903. At that time the stock of said corporation was held as follows: By George W. Smith, 363 shares; by Samuel L. Rumsey, 100 shares; by Alexis J. Gignoux, 30 shares; the remaining seven shares being held by several other parties, the initial capitalization having been $50,000. In 1903, and prior to the application for said policy, it was agreed between said three principal stockholders, they being at the time also the president and manager, treasurer and secretary of said corporation, that they should mutually insure their lives in the sum of five thousand dollars each, at the expense of Benson, Smith & Company, Limited, and for its benefit—Benson, Smith & Company, Limited being named as the beneficiary in such policy. All premiums upon the policy were paid by Benson, Smith & Company, Limited, except that, some years later, Rumsey also paid a separate premium to the New [354] York Life Insurance Company. The payment was made to the agent of the insurance company at Denver, Colorado, by the attorney of the Rumseys. The receipt for the money given by the agent recites that the payment was received from the attorney "for his accommodation and at his request" and that "neither I nor the office of said company with which I am connected have any record or knowledge of said policy, or authority to collect a premium upon it." The insurance company tendered the money back and then paid it into court and

the New York Life Insurance Company "has not since that time had or received said sum of money or any part thereof in its possession." In January, 1904, Rumsey left the Territory of Hawaii and was never again actively connected with Benson, Smith & Company, Limited, or its business, and never again returned to the Territory. In February, 1905, Rumsey resigned the office of treasurer, the salary of which ($250 per month) had apparently been paid to him up to that time. This retirement of Rumsey from the office of treasurer was caused because it had then "become apparent to him, the said Samuel L. Rumsey, and to said drug company, that he, said Samuel L. Rumsey, could not on account of the condition of his health ever return to the Territory of Hawaii, or ever again resume active connection with said drug company, or its business." Thereafter Rumsey did not draw any salary as an officer or as an employee of said corporation. While residing in the states Rumsey married the petitioner-appellee and later transferred to her all of his stock—one hundred shares—in said Benson, Smith & Company, Limited. This stock was later sold and transferred by petitioner-appellee to Benson, Smith & Company, Limited. The policy, while agreeing to pay (in the event of the death of Rumsey) the sum of Five Thousand Dollars to Benson, Smith & Company, Limited, "or its legal representatives, or to such beneficiary as may have been duly designated, at the home [355] office of the company in the city of New York," also contained a provision whereby the assured might change the beneficiary at any time

during the continuance of the policy, " by written notice to the company at the home office, provided the policy is not then assigned." The policy never was assigned. "No designation, or change of beneficiary, * * * shall take effect until endorsed on this policy by the company at the home office." The physical possession of the policy has always been held by Benson, Smith & Company, whereby it became impossible for Rumsey to technically comply with the provision of the policy regarding a change of beneficiary. Rumsey, however, some time before his death, formally notified the New York Life Insurance Company that he had changed the beneficiary by substituting his wife, the petitioner-appellee, for Benson, Smith & Company. The New York Life Insurance Company replied to this notice that this change could not be made except by the manual and physical delivery of the policy itself at the home office for the purpose of having such endorsement made thereon. A long correspondence occurred between Rumsey and his wife and Benson, Smith & Company, Limited, which manifests a difference of opinion between them as to their respective rights under the policy, Benson, Smith & Company insisting upon the right to be considered the sole owner of all beneficial interest therein and the Rumseys insisting that even though such beneficial interest had formerly existed in Benson, Smith & Company, Limited, it had ceased upon the cessation of the relationship between Rumsey & Benson, Smith & Company, Limited.

The Circuit Judge held that Benson, Smith & Company, Limited, had no insurable interest in the life of Rumsey; "that this entire series of transactions constituted what, in law, are known as wagering contracts,—and that the real purpose of the corporation in taking out the insurance in question, when [356] stripped of verbiage and euphonious diction, was merely to speculate upon the lives of the three principal stockholders in the corporation."

In our opinion this conclusion is not supported or warranted by the facts in the case, that is, the agreed statement of facts, the affidavits and depositions—the only facts before the trial judge and necessarily the only evidence upon which he could predicate a decision.

The purpose of the insurance was to protect the interests of Benson, Smith & Company, Limited, against a sudden demand for funds in the event of the death of any of the three men, they virtually owning the entire business; that also was Rumsey's understanding of the matter, and he regarded it as a perfectly legitimate business transaction and not that he was participating in a gambling scheme—nor was the contract in contravention of the rule of public policy against wager policies.

In Grigsby v. Russell, 222 U. S. 149, 154, the Court says: "Of course the ground suggested for denying the validity of an assignment to a person having no interest in the life insured is the public policy that refuses to allow insurance to be taken out by such persons in the first place. A contract of insurance upon a life in which the insured has no interest is a

pure wager that gives the insured a sinister counter interest in having the life come to an end. * * * But when the question arises upon an assignment it is assumed that the objection to the insurance as a wager is out of the case. * * * This being so, not only does the objection to wagers disappear, but also the principle of public policy referred to. * * * The danger that might arise from a general license to all to insure whom they like does not exist. Obviously it is a very different thing from granting such a general license, to allow the holder of a valid insurance upon [357] his own life to transfer it to one whom he, the party most concerned, is not afraid to trust. * * * So far as reasonable safety permits it is desirable to give to life policies the ordinary characteristics of property."

If a man can assign a policy of life insurance to one having absolutely no interest in his life, it would be absurd to assert that a man may not insure his own life in favor of one who has no insurable interest in it. This conception of the position of the parties is fully sustained by the authorities. Cooley's Brief on Insurance, 252, and cases cited. If the policy was taken out by Rumsey for the benefit of Benson, Smith & Company, Limited, it to pay the premiums under an agreement between the three stockholders in said corporation, Smith, Rumsey and Gignoux, that each of the other stockholders, Smith and Gignoux, at the time take out similar policies, which they did, Rumsey would not afterwards be any more at liberty to change the beneficiary under said policy than he would have been to change an assignee to whom he

had assigned a policy on his life for a valuable consideration.

From this view of the case, which is entirely compatible with the records, the decision of the trial judge cannot be sustained.

That the insurance was taken out by Benson, Smith & Company upon the life of Rumsey in consequence of the agreement entered into by Smith, Rumsey and Gignoux can also be substantiated by the record. If such was the case, and we are of the opinion that this was the fact, the great weight of modern authorities hold that it, Benson, Smith & Company, Limited, did have an insurable interest in the life of the insured (Rumsey).

> "An insurable interest exists whenever the relation between the assured and insured whether by blood, marriage *or commercial intercourse,* is such that the assured has a reasonable expectation of deriving benefit from the continuation of the life of the insured, *or of suffering detriment* or incurring liability through its termination." Vance on Insurance, p. 129. [358]
>
> "It may be said generally, however, that while the earlier cases show a disposition to restrict it to a clear, substantial, vested pecuniary interest, and to deny its applicabilty to a mere expectancy without any vested right, the tendency of modern decisions is to relax the stringency of the earlier cases, and to admit to the protection of the contract whatever act, event, or property bears such a relation to the person seeking insurance that

it can be said with a *reasonable degree of probability to have a bearing upon his prospective pecuniary condition.*" May on Insurance, Sec. 76.

"Where there are no ties of blood or marriage between the person whose life is insured and the person who procures the policy on such life there must be some pecuniary interest of the latter in the life of the former to sustain the insurance. *But an indirect advantage is sufficient,* and a moral obligation will support the policy. It is enough that *in the ordinary course of events pecuniary loss or disadvantage will naturally and probably result* from the death of the one whose life is insured to the person obtaining the policy." 25 Cyc. 706.

"Indeed, it may be said generally that *any reasonable expectation of pecuniary benefit* or advantage from the continued life of another creates an insurable interest in such life. * * * The essential thing is, that the policy shall be obtained in *good faith,* and not for the purpose of speculating upon the hazard of a life in which the insured has no interest." *Conn. M. L. Ins. Co.* v. *Schaefer,* 94 U. S. 457, 460.

"Although, as was said by Mr. Justice Field, in *Warnock* v. *Davis,* 104 U. S. 775, it is not easy to define with precison what will constitute such an interest, it may be stated generally to exist whenever the relations between the insured and the beneficiary are such as to justify a reasonable expectation that the continuance of the life

of the former will result in advantage or benefit to the latter. It is not necessary, in order to create such an interest, that the insured shall be under any *legal* obligation, either financial or otherwise, to the beneficiary. It is not even necessary that kinship shall exist between the parties if the insured is under a *moral* obligation to render care and assistance to the beneficiary in the time of the latter's need, then the latter has an insurable interest, other than a mere pecuniary one, in the life of the former." Thomas v. Nat. Ben. Assn., 84 N. J. L. 281, 282.

"One not the wife, child, parent, brother, sister or creditor of insured may have an insurable interest in his life." Kentucky Life & Acc. Ins. Co. v. Hamilton, 63 Fed. 93.

The appellant, the New York Life Insurance Company, having paid the judgment rendered against it in favor of the beneficiary in said policy, Benson, Smith & Company, Limited, is absolved from any and all further liability under said policy. [359]

The decree appealed from is reversed and the cause remanded to the Circuit Judge for such further action compatible to this decision as may be necessary.

ANDREWS & PITTMAN, for Petitioner.

THOMPSON & CATHCART, for the Insurance Company.

ROBERTSON & OLSON, for Benson, Smith & Co. Ltd.

S. B. KEMP,
W. S. EDINGS,
J. T. DE BOLT,

[Endorsed]: No. 1172. Supreme Court, Territory of Hawaii. October Term, 1918. Emma Forsyth Rumsey v. New York Life Insurance Company and Benson, Smith & Company, Limited. Opinion. Filed October 1, 1919, at 10:15 A. M. J. A. Thompson, Clerk. [360]

In the Supreme Court of the Territory of Hawaii.

No. 1172.

EMMA FORSYTH RUMSEY,
Complainant-Appellee,
vs.
NEW YORK LIFE INSURANCE COMPANY and BENSON, SMITH & COMPANY, LIMITED,
Respondents-Appellants.

Decree.

Pursuant to the opinion filed herein on the 1st day of October, 1919, the decree appealed from is reversed and the cause remanded to the Circuit Judge for such further action compatible to the decision as may be necessary.

Dated, Honolulu, T. H., October 2, 1919.

By the Court.

[Seal] J. A. THOMPSON,
Clerk.

[Endorsed]: No. 1172. In the Supreme Court of the Territory of Hawaii. Emma Forsyth Rumsey, Complainant-Appellee, vs. New York Life Insur-

ance Company, and Benson, Smith & Company, Limited, Respondents-Appellants. Decree. Filed October 2, 1919, at 10:15 A. M. J. A. Thompson, Clerk. Robertson & Olson, 863 Kaahumanu Street, Honolulu, T. H., Attorneys for Respondents-Appellants. [361]

In the Supreme Court of the Territory of Hawaii.

No. 1172.

EMMA FORSYTH RUMSEY,
Complainant-Appellant,
vs.

NEW YORK LIFE INSURANCE COMPANY and BENSON, SMITH & COMPANY, LIMITED,
Respondents-Appellees.

Petition for an Appeal.

To the Honorable Chief Justice of the Supreme Court of the Territory of Hawaii:

Now comes the complainant-appellant herein, by and through Andrews & Pittman, her attorneys, and feeling aggrieved by the final decision and decree of this Court entered herein on 2d day of October, 1919, hereby prays that an appeal may be allowed her from said decision and decree, to the United States Circuit Court of Appeals, for the Ninth Circuit, San Francisco, State of California, according to the laws of the United States in that behalf made and provided; and that a transcript of the record, proceedings and documentary exhibits upon which said decision and de-

cree was made, duly authenticated, *amy* be sent to said United States Circuit Court of Appeals for said Circuit, and in connection with this petition petitioner herewith presents her assignments of errors.

And petitioner further prays that the amount of security may be fixed by an order allowing this appeal.

Your petitioner further shows that the said decision and [362] decree was rendered in an action in equity and that the amount involved, exclusive of costs, exceeds five thousand dollars ($5,000.00).

Dated: Honolulu, T. H., November 26, 1919.

EMMA F. RUMSEY,
By ANDREWS & PITTMAN,
Her Attorneys.

Territory of Hawaii,
City and County of Honolulu,—ss.

W. B. Pittman, being first duly sworn, deposes and says: That he is one of the attorneys for Emma F. Rumsey, petitioner herein; that he has read the above and foregoing petition for an appeal and knows the contents thereof and that the same is true; that the amount involved in the cause aforesaid, exclusive of costs, exceeds the sum of five thousand dollars ($5,000.00).

W. B. PITTMAN.

Subscribed and sworn to before me this 26th day of November, 1919.

[Seal] MINA D. CAIN,
Notary Public, First Judicial Circuit, Territory of Hawaii.

(Filed November 28, 1919.) [363]

In the Supreme Court of the Territory of Hawaii.

No. 1172.

EMMA F. RUMSEY,

Complainant-Appellant,

vs.

NEW YORK LIFE INSURANCE COMPANY and BENSON, SMITH & COMPANY, LIMITED,

Respondents-Appellees.

Assignments of Error on Appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

Comes now Emma F. Rumsey, complainant-appellant in the above-entitled cause, by Andrews & Pittman, her attorneys, and says that in the record and proceedings in the above-entitled cause in the Supreme Court of the Territory of Hawaii, and in the rendition of its final decision and decree therein, there are and have intervened manifest errors prejudicial to said complainant-appellant, to wit:

I.

That said Supreme Court erred in overruling the decree of the Circuit Court of the First Judicial Circuit of the Territory of Hawaii in said cause.

II.

That said Supreme Court erred in not sustaining the decree of the said Circuit Court and in not deciding that a decree should be entered in favor of the said Emma F. Rumsey, complainant-appellant, as prayed for in her bill of complaint in said cause.

[364]

III.

That said Supreme Court erred in holding and deciding that respondent Benson, Smith & Company, Limited, ever had an insurable interest in the life of Samuel L. Rumsey.

IV.

That the said Supreme Court erred in holding and deciding that if there was an insurable interest had by Benson, Smith & Company, Limited, in the life of Samuel L. Rumsey under the policy sued upon in this cause, said insurable interest did not cease at the time of the severance of the said Rumsey's business connection with the said Benson, Smith & Company, Limited.

V.

That the said Supreme Court erred in not holding that if there was an insurable interest had by Benson, Smith & Company, Limited, in the life of Samuel L. Rumsey, then the said insurable interest ceased at the time the said Rumsey severed his business connections with the said Benson, Smith & Company, Limited.

VI.

That the said Supreme Court erred in holding that Benson, Smith & Company, Limited, was the absolute beneficiary under the policy held in the New York Life Insurance Company by the said Samuel L. Rumsey at the time of his death.

VII.

That the said Supreme Court erred in not holding that Emma F. Rumsey, complainant-appellant, was the sole beneficiary under said policy at the time of

the death of Samuel L. Rumsey, and at the time of the rendition of the decree herein.

VIII.

That said Supreme Court erred in holding and deciding [365] that the Judge of the Circuit Court of the First Judicial Circuit of the Territory of Hawaii erred in the rendition of the decree in favor of complainant-appellant.

WHEREFORE the complainant-appellant prays that said decision and decree be reversed and that said Supreme Court of the Territory of Hawaii be ordered to enter a decree reversing the decision and decree of said Supreme Court of the Territory of Hawaii.

Dated: Honolulu, T. H., November 26, 1919.

EMMA F. RUMSEY,
Complainant-Appellant,
By ANDREWS & PITTMAN,
Her Attorneys.
Per W. B. PITTMAN.

[Endorsed]: No. 1172. Filed November 28, 1919, at 10:15 A. M. J. A. Thompson, Clerk. [366]

In the Supreme Court of the Territory of Hawaii.

No. 1172.

EMMA F. RUMSEY,

Complainant-Appellant,

vs.

NEW YORK LIFE INSURANCE COMPANY and BENSON, SMITH & COMPANY, LIMITED,

Respondents-Appellees.

Order Allowing Appeal and Fixing Amount of Bond.

On reading and filing the verified petition of complainant-appellant, Emma F. Rumsey, to the United States Circuit Court of Appeals for the Ninth Circuit; and upon consideration of the assignments of errors presented and filed herein;

IT IS ORDERED that said appeal from the final decision and decree of this Court entered herein on the 2d day of October, 1919, to the United States Circuit Court of Appeals for the said Ninth Circuit, be and the same is hereby allowed.

And said petitioner is ordered to file with the Clerk of this Court within sixty (60) days from date hereof an approved bond in the sum of five hundred dollars ($500.00) conditioned that complainant-appellant will prosecute said appeal to a final conclusion and effect and answer all damages and costs if complainant-appellant fails to make good her said plea on appeal.

Dated: Honolulu, T. H., November 28, 1919.

[Seal] S. B. KEMP,

Associate Justice of the Supreme Court, Territory of Hawaii.

[Endorsed]: No. 1172. In the Supreme Court of the Territory of Hawaii. Emma F. Rumsey, Complainant-Appellant, vs. New York Life Insurance Company, and Benson, Smith & Co., Ltd., Respondents-Appellees. Order Allowing Appeal and Fixing Amount of Bond. Filed November 28, 1919, at 10:35 A. M. J. A. Thompson, Clerk. Andrews & Pittman, Attorneys for Complainant-Appellant. [367]

In the Supreme Court of the Territory of Hawaii.

No. 1172.

EMMA F. RUMSEY,

Complainant-Appellant,

vs.

NEW YORK LIFE INSURANCE COMPANY and BENSON, SMITH & COMPANY, LIMITED,

Respondents-Appellees.

Citation on Appeal to the United States Circuit Court of Appeals.

United States of America,—ss.

To New York Life Insurance Company and Benson, Smith & Company, Limited, GREETINGS:

You and each of you are hereby cited and admon-

ished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, State of California, within thirty (30) days from the date of this citation, pursuant to an appeal duly allowed by the Supreme Court of the Territory of Hawaii filed in the clerk's office of said Court on the —— day of November, 1919, in the cause wherein Emma F. Rumsey is complainant-appellant and you are respondents-appellees, to show cause, if any there be, why the decision and decree rendered against said complainant-appellant, as in said appeal mentioned, should not be corrected and why speedy justice should not be [368] done to the party in that behalf.

WITNESS the hand and seal of the Honorable Justice of the Supreme Court of the Territory of Hawaii this twenty-eighth day of November, One Thousand Nine Hundred and nineteen.

S. B. KEMP,

Associate Justice, Supreme Court of the Territory of Hawaii.

[Seal] Attest: J. A. THOMPSON,

Clerk of the Supreme Court of the Territory of Hawaii.

Service of the within citation and receipt of copy thereof is hereby admitted this 28th day of November, 1919.

THOMPSON & CATHCART,
Per B. S. U.

Attorneys for New York Life Insurance Company.

ROBERTSON & OLSON,

Attorneys for Benson, Smith & Company, Limited.

[369]

[Endorsed]: No. 1172. In the Supreme Court of the Territory of Hawaii. Emma F. Rumsey, Complainant-Appellant, vs. New York Life Insurance Company, and Benson, Smith & Company, Ltd., Respondents-Appellees. Citation on Appeal to the United States Circuit Court of Appeals. Filed and Issued for Service November 28, 1919, at 10:50 A. M. J. A. Thompson, Clerk. Returned at 2:03 P. M. November 28, 1919. J. A. Thompson, Clerk. [370]

In the Supreme Court of the Territory of Hawaii.

(10c Documentary Stamp.)

EMMA F. RUMSEY,

Complainant-Appellant,

vs.

NEW YORK LIFE INSURANCE COMPANY and BENSON, SMITH & COMPANY, LIMITED,

Respondents-Appellees.

Cost Bond on Appeal to the United States Circuit Court of Appeals.

KNOW ALL MEN BY THESE PRESENTS: That we, Emma F. Rumsey, as Principal, and National Surety Company, of 115 Broadway, New York City, State of New York, U. S. A., as surety, are held and firmly bound unto the New York Life Insurance Company and Benson, Smith & Company, Limited, in the sum of Five Hundred Dollars ($500.00), to the payment whereof, well and truly to

be made, we do hereby jointly and severally firmly bind ourselves and our respective heirs, successors, executors and administrators.

THE CONDITION OF THIS OBLIGATION IS SUCH, that,

WHEREAS, in an action in equity heretofore pending in and before the Supreme Court of the Territory of Hawaii, wherein said bounden principal was complainant-appellee, and obligees were respondents-appellants, the said Supreme Court did on the 2d day of October, 1919, render and enter a decree of said Supreme Court wherein and whereby there was overruled a certain decree therefore, to wit, on the 1st day of April, [371] 1919, rendered and entered in and by the Circuit Court for the First Judicial Circuit, Territory of Hawaii, in a cause wherein said bounden principal was complainant and said obligees were respondents, and which said decree was in favor of said complainant.

AND WHEREAS said bounden principal has appealed from said decree of the Supreme Court of the Territory of Hawaii to the United States Circuit Court of Appeals for the Ninth Circuit, to the end that the said decree of the Supreme Court of the Territory of Hawaii may be reviewed by said Circuit Court of Appeals for the Ninth Circuit, and has taken, or is about to take, such other and further proceedings as may be necessary to obtain a review by said United States Circuit Court of Appeals for the Ninth Circuit of the decree of the said Supreme Court of the Territory of Hawaii:

NOW, THEREFORE, if the said bounden principal shall prosecute said appeal to final conclusion and effect, and shall answer all damages and costs if she fails to make her plea good, then the above obligation shall be void; otherwise to remain in full force and effect.

IN WITNESS WHEREOF, the said principal and surety have hereunto set their hands and seals this 19th day of December, A. D. 1919.

EMMA F. RUMSEY,
Principal.
NATIONAL SURETY COMPANY,
By JAMES S. WHITE, JR.,
Attorney in Fact. (Seal)
By SAML. G. WILDER,
Attorney in Fact. [372]

The foregoing bond is approved as to its form, as to its amount, and as to the sufficiency of its surety, this 7th day of January, A. D. 1920.

[Seal] S. B. KEMP,
Associate Justice of the Supreme Court of the Territory of Hawaii.

(Filed January 7, 1920.) [373]

In the Supreme Court of the Territory of Hawaii.

No. 1172.

EMMA F. RUMSEY,

Complainant-Appellant,

vs.

NEW YORK LIFE INSURANCE COMPANY and BENSON, SMITH & COMPANY, LIMITED,

Respondents-Appellees.

Praecipe for Transcript of Record on Appeal to United States Circuit Court of Appeals.

To James A. Thompson, Esq., Clerk of the Supreme Court of the Territory of Hawaii:

You will please prepare a transcript of the record in the above-entitled cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit pursuant to the appeal allowed by the above-entitled court, and include in said transcript the following pleadings, proceedings, etc.:

1. Stipulation as to the time of filing amended bill of complaint, and as to the time of filing answer to amended bill of complaint, dated and filed June 5, 1916.
2. Petitioner's amended bill of complaint, filed June 13, 1916; with exhibits attached thereto, as follows:

   Exhibit "A"—Copy of application to New York Life Insurance Company (No. 3,442,989) by Samuel L. Rumsey.

Exhibit "B"—Copy of agreement of New York Life Insurance Company to pay to Benson, Smith & Company, Limited, the sum of $5,000 upon receipt and approval of proofs of death of Samuel L. Rumsey.

Exhibit "C"—Copy of the opinion and dissenting opinion of the Supreme Court of the State of Colorado in the case of petitioner herein against New York Life Insurance Company, on error to the District Court of the City and County of Denver. [374]

3. Demurrer of respondent New York Life Insurance Company to amended bill of complaint, filed July 22, 1916.
4. Demurrer of respondent Benson, Smith & Company, Ltd., to amended bill of complaint, filed August 1, 1916.
5. Separate answer of the respondent New York Life Insurance Company to the amended bill of complaint, filed October 1, 1916.
6. Replication of Emma Forsyth Rumsey, petitioner, to the separate answer of respondent New York Life Insurance Company, filed October 10, 1916.
7. Answer of respondent Benson, Smith & Company, Limited, to the amended bill of complaint, filed October 10, 1916.
8. Replication of Emma Forsyth Rumsey, petitioner, to the answer of respondent Benson, Smith & Company, Ltd., filed October 12, 1916.

9. Stipulation of the parties as to the agreed facts, filed March 5, 1918.
10. Opinion and decision of the Honorable C. W. Ashford, First Judge, Circuit Court, First Circuit, filed February 5, 1919.
11. Decree of the Circuit Court, First Circuit, entered and filed April 2, 1919.
12. Notice of appeal by respondents, filed April 4, 1919.
13. Stipulation that the original stipulation as to the agreed facts be included in and as part of the record transmitted to the Supreme Court, filed April 5, 1919.
14. Order that the original stipulation as to the agreed facts be included in and as part of the record transmitted to the Supreme Court, filed April 5, 1919.
15. Opinion of the Supreme Court of the Territory of Hawaii, rendered and filed October 1, 1919.
16. Decree of the Supreme Court of the Territory of Hawaii, entered and filed October 2, 1919.
17. Petition of plaintiff for appeal to the United States Circuit Court of Appeals for the Ninth Circuit; and assignments of error, filed November 28, 1919.
18. Order allowing the appeal and fixing amount of bond, filed November 28, 1919. [375]
19. Citation on appeal to the United States Circuit Court of Appeals, filed November 28, 1919, with acknowledgments of service thereon by Messrs. Thompson & Cathcart, attorneys for New York Life Insurance Company, and

Messrs. Robertson & Olson, attorneys for Benson, Smith & Company, Limited.

20. Bond on appeal.

You will also annex to and transmit with the record your certificate under seal stating in detail the cost of the record and by whom the same was paid.

Honolulu, T. H., December 4, 1919.

Respectfully,

ANDREWS & PITTMAN,

Attorneys for Complainant-Appellant.

Service of a copy of the foregoing Praecipe for Transcript is hereby acknowledged.

THOMPSON & CATHCART,

C.,

Attorneys for New York Life Insurance Company.

ROBERTSON & OLSON,

Attorneys for Benson, Smith & Company, Limited.

[Endorsed]: #1172. In the Supreme Court of the Territory of Hawaii. Emma F. Rumsey, Complainant-Appellant, vs. New York Life Insurance Company and Benson, Smith & Company, Ltd., Respondents-Appellees. Praecipe for Transcript of Record on Appeal to U. S. Circuit Court of Appeals. Filed December 4, 1919, at 3:15 P. M. J. A. Thompson, Clerk. Andrews & Pittman, Attorneys for Complainant-Appellant. [376]

In the Supreme Court of the Territory of Hawaii.

No. 1172.

EMMA F. RUMSEY,

Complainant-Appellant,

vs.

NEW YORK LIFE INSURANCE COMPANY and BENSON, SMITH & COMPANY, LIMITED,

Respondents-Appellees.

Order Extending Time to and Including February 28, 1920, for Preparation and Transmission of Record.

Upon application of counsel for appellant and just cause appearing therefor, and pursuant to Section 1 of Rule 16 of the United States Circuit Court of Appeals for the Ninth Circuit,—

IT IS HEREBY ORDERED that appellant and the clerk of this court be and they are hereby allowed to and including the 28th day of February, 1920, within which time to prepare and transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, the record in the above-entitled cause on appeal, together with the petition for appeal, assignments of error, order allowing appeal, bond, and all other papers regarded as part of said record.

Dated: Honolulu, T. H., December 11, 1919.

[Seal] S. B. KEMP,

Justice Supreme Court, Territory of Hawaii.

[377]

[Endorsed]: No. 1172. In the Supreme Court of the Territory of Hawaii. Emma F. Rumsey, Complainant-Appellant, vs. New York Life Insurance Co., et al., Respondents-Appellees. Order Extending Time for Preparation and Transmission of Record. Filed December 11, 1919, at 3:20 P. M. J. A. Thompson, Clerk. [378]

In the Supreme Court of the Territory of Hawaii.

October Term, 1919.

No. 1172.

EMMA F. RUMSEY,

Complainant,

vs.

NEW YORK LIFE INSURANCE COMPANY and BENSON, SMITH & COMPANY, LIMITED,

Respondents.

Certificate of Clerk to Transcript of Record.

Territory of Hawaii,
City and County of Honolulu,—ss.

I, James A. Thompson, Clerk of the Supreme Court of the Territory of Hawaii, by virtue of the petition for appeal herein filed, a copy whereof is attached to the foregoing transcript of record, being pages 362 to 363, both inclusive, and in pursuance to the praecipe to me directed, a copy whereof is hereto attached, being pages 374 to 376, both inclusive, DO HEREBY TRANSMIT to the Honorable United

States Circuit Court of Appeals for the Ninth Circuit the foregoing transcript of record, being pages 1 to 361, both inclusive, page 367, and pages 371 to 373, both inclusive, AND DO HEREBY CERTIFY that the same are full, true and correct copies of the pleadings, record, proceedings, exhibits, depositions, opinions and decrees which are now on file and of record in the office of the clerk of the Supreme Court of the Territory of Hawaii in a cause entitled, "Emma F. Rumsey, Complainant, vs. New York Life Insurance Company and Benson, Smith & Company, Limited, Respondents," Number 1172. [379]

I DO FURTHER CERTIFY that the original assignment of errors on appeal, being pages 364 to 366, both inclusive, the original citation on appeal, with acknowledgments of service thereof, being pages 368 to 370, both inclusive, and the original order extending time for preparation and transmission of record, filed December 11, 1919, being pages 377 to 378, both inclusive, of the foregoing transcript are herewith returned.

I ALSO CERTIFY that the cost of the foregoing transcript of record is $167.50, and that said amount has been paid by Messrs. Andrews & Pittman, attorneys for the complainant-appellant.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the Supreme Court of the Territory of Hawaii, at Honolulu, City and County of Honolulu, this 16th day of January, A. D. 1920.

[Seal] JAMES A. THOMPSON,
Clerk of the Supreme Court of the Territory of Hawaii. [380]

[Endorsed]: No. 3444. United States Circuit Court of Appeals for the Ninth Circuit. Emma F. Rumsey, Appellant, vs. New York Life Insurance Company and Benson, Smith & Company, Limited, Appellees. Transcript of Record. Upon Appeal from the Supreme Court of the Territory of Hawaii.

Filed January 28, 1920.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the Supreme Court of the Territory of Hawaii.

No. 1172.

EMMA F. RUMSEY,
Complainant-Appellant,
vs.

NEW YORK LIFE INSURANCE COMPANY and BENSON, SMITH & COMPANY, LIMITED,
Respondents-Appellees.

Order Extending Time to and Including February 28, 1920, to File Record and Docket Cause.

Upon application of counsel for appellant and just cause appearing therefor, and pursuant to Section 1 of Rule 16 of the United States Circuit Court of Appeals for the Ninth Circuit,—

IT IS HEREBY ORDERED that appellant and the clerk of this Court be and they are hereby allowed

to and including the 28th day of February, 1920, within which time to prepare and transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, the record in the above-entitled cause on appeal, together with the petition for appeal, assignments of error, order allowing appeal, bond, and all other papers regarded as part of said record.

Dated: Honolulu, T. H., December 11, 1919.

[Seal] (Signed) S. B. KEMP,
Justice Supreme Court, Territory of Hawaii.

CERTIFICATE.

Territory of Hawaii.
City and County of Honolulu,—ss.

I, James A. Thompson, Clerk of the Supreme Court of the Territory of Hawaii, do hereby certify, that the foregoing document and attached hereto, is a full, true and correct copy of the original Order Extending Time for Preparation and Transmission of Record which is now on file in the office of the Clerk of the Supreme Court in the foregoing entitled cause No. 1172.

WITNESS my hand and the Seal of the Supreme Court of the Territory of Hawaii, at Honolulu, City and County of Honolulu, this 11th day of December, 1919.

[Seal] JAMES A. THOMPSON,
Clerk Supreme Court, Territory of Hawaii.

[Endorsed]: No. 1172. In the Supreme Court of the Territory of Hawaii. Emma F. Rumsey, Complainant-Appellant, vs. New York Life Insurance

Co., et al., Respondents-Appellees. Order Extending Time for Preparation and Transmission of Record. Filed December 11, 1919, at 3:20 P. M. J. A. Thompson, Clerk.

No. 3444. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to February 28, 1920, to File Record Thereof and to Docket Case. Filed Dec. 22, 1919. F. D. Monckton, Clerk. Refiled Jan. 28, 1920. F. D. Monckton, Clerk.

No. 3444

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

7

EMMA F. RUMSEY,
Appellant,

vs.

NEW YORK LIFE INSURANCE COMPANY and BENSON, SMITH & COMPANY, LIMITED,
Appellees.

BRIEF FOR APPELLEE, NEW YORK LIFE INSURANCE COMPANY.

J. M. MANNON, JR.,
McCUTCHEN, WILLARD, MANNON & GREENE,
Attorneys for Appellee,
New York Life Insurance Company.

JAMES H. McINTOSH,
Of Counsel.

PERNAU-WALSH PRINTING CO.

Outline of Argument.

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I. Suit involves policy issued in 1903 on life of Samuel L. Rumsey, appellant's husband 1- 2

Policy taken out pursuant oral agreement three officers and principal stockholders of Benson, Smith & Company, Limited, Hawaiian Drug Company, including Rumsey, treasurer. Drug Company named beneficiary to protect it event Rumsey's death. It agreed to and did pay all premiums 3

Policy gave insured right to change beneficiary provided it not then assigned and change endorsed on policy at home office insurance company 4

Rumsey later severed connection with the Drug Company 4

Thereafter Rumsey requested insurance company substitute Mrs. Rumsey for Drug Company as beneficiary. Policy did not accompany request, no change beneficiary endorsed on it and company insisted on production of policy 5

June 11, 1910, Mrs. Rumsey attempted for first time to pay annual premium, Denver agent insurance company 5

July 27, 1910, death of Rumsey 5

August 15, 1910, Mrs. Rumsey commenced suit against insurance company in Colorado state court, but complaint dismissed and judgment affirmed by Supreme Court 6

1910 annual premium deposited in Colorado court for Mrs. Rumsey's benefit 5

February 24, 1913, Drug Company recovered judgment in Circuit Court Hawaii against insurance company for proceeds policy, interest and costs, and insurance company paid judgment 6

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June 13, 1916, Mrs. Rumsey filed amended bill of complaint in Circuit Court Hawaii against against Drug Company and insurance company, and secured judgment in her favor.... 6

Supreme Court Hawaii ordered judgment reversed and remanded cause to Circuit Court for further action compatible with its decision 6

This appeal prosecuted from decision Supreme Court of Hawaii, and record does not show what further proceedings were had in trial court 7

II. Appellant's assignments of error included in two groups 7

1. Drug Company either had no insurable interest in Rumsey's life, or if such interest ever existed. it ceased with Rumsey's employment.
2. Appellant is sole beneficiary under policy, on account claimed change of beneficiary.

III. Two views of facts are possible..... 8

1. Rumsey took out policy and assigned it to Drug Company.
2. Drug Company took out policy.

IV. Question of Insurable Interest..... 8

A. Policy taken out pursuant to oral agreement between three principal officers and stockholders of Drug Company to protect against loss and to provide funds to repurchase his stock in case of Rumsey's death.. 8-14

B. Assuming that Rumsey took out policy it is valid because:

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3. Payment of premiums by assignee or beneficiary without insurable interest does not render policy void ..... 17 - 19

4. Insurable interest in assignee is unnecessary ..... 19 - 27

C. Assuming that Drug Company took out policy it is valid because Drug Company had pecuniary (and therefore insurable) interest in life of life of Rumsey, its employe, treasurer, and stockholder ..... 27 - 30

If Drug Company took out policy but had no insurable interest, then policy is void and there can be no recovery thereon by appellant or anyone else shown by appellant's citations holding:

1. Where the person who procures policy is without insurable interest, policy is gambling contract and hence absolutely void 32

2. Where policy is procured by one having insurable interest, but assigned or made payable to one without such interest, assignee or beneficiary can recover only consideration paid by him, and representatives insured can recover balance, because policy valid in inception. This is minority view 33

Decided preponderance of authorities holds that corporation has insurable interest in lives of officers and principal stockholders ..... 34 - 42

Question of Insurable Interest properly raised only by Insurance Company ..... 42 - 44

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A. Rumsey had no such right because he either took out policy and assigned it to Drug Company, or Drug Company took out policy originally. In either case Rumsey had no interest in policy ..... 44 - 46

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B. Rumsey gained no new right through letters with Drug Company, for he did not accept offer to sell policy which Smith made ..... 46 - 48

C. Rumsey's attempt to change beneficiary failed because policy was then assigned, and because he did not produce policy so that change could be endorsed upon it.... 48 - 51

D. The Insurance Company did not waive production of policy as pre-requisite to change of beneficiary, and his inability to produce same was caused by his own act in having the policy delivered to the Drug Company ..... 51 - 55

VI. If Appellant ever had right to have policy reformed, she has lost it through her laches. This suit brought more than four years after policy became payable. In interval, Drug Company compelled Insurance Company to pay it proceeds of policy. Had appellant brought suit in Hawaii promptly, Insurance Company would not have suffered this prejudicial change of position..... 55 - 59

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No. 3444

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EMMA F. RUMSEY,
Appellant,

vs.

NEW YORK LIFE INSURANCE COMPANY and BENSON, SMITH & COMPANY, LIMITED,
Appellees.

BRIEF FOR APPELLEE, NEW YORK LIFE INSURANCE COMPANY.

I.

Statement of the Case.

We adopt the following statement of facts from the brief of Benson, Smith & Co., Ltd., appellee (Brief, pp. 1 to 7):

On June 13, 1916, Emma F. Rumsey, the appellant, filed in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, at Chambers, her amended bill in equity, in which she prayed that the policy issued by the New York Life Insurance Company on the life of Samuel L. Rumsey, on June 11, 1903, be reformed by

declaring her to be the beneficiary thereunder; that the New York Life Insurance Company be decreed to pay to the complainant the amount specified in said policy ($5000), with interest from July 27, 1910; that Benson Smith & Co. be declared the trustee for the complainant of said policy upon payment by her of such sums of money as it may have paid as premiums on said policy on her behalf; and for general relief (Tr., pp. 20, 21).

On October 10, 1916, Benson, Smith & Co. filed its answer, admitting many of the averments contained in the amended bill of complaint, denying the vital averments on which the complainant based her claim for relief, and setting up laches as an affirmative defense (Tr., pp. 101-113).

The case was then submitted to the trial judge upon an agreed statement of facts (Tr., pp. 117-403) in which was included certain correspondence (Sec. IV, p. 130; Sec. VI, p. 255; Sec. VIII, p. 282) and certain depositions (Sec. V, p. 187), and it was agreed (Sec. XIX, p. 402) that testimony could be introduced at the hearing, and that in the event of any conflict between any stipulated fact and any deposition, document or evidence in said stipulation, or evidence adduced at the hearing, the court could disregard any such statement and consider in lieu thereof such other deposition, document or evidence. The trial judge referred to that clause (Tr., p. 416) in connection with his ruling that the policy in question was a wagering contract. His conclusion on that point, however, was a conclusion of

law, and not a finding of fact. Whatever it was, it was overruled by the Supreme Court.

The agreed facts were, in substance, (1) that Benson, Smith & Co., Ltd., was incorporated in 1898 for the purpose of buying, selling and dealing in and manufacturing drugs, medicines and other commodities pertaining to said line of business, with a capital stock of $70,000, divided into 700 shares of the par value of $100 each (Tr., pp. 118-121); (2) that on June 11, 1903, Samuel L. Rumsey made application to the New York Life Insurance Company for insurance on his own life in the sum of $5000 (Tr., p. 121); (3) that since the year 1903 the said Samuel L. Rumsey, and one George W. Smith and one Alexis J. Gignoux were officers, directors and stockholders of and in said Benson, Smith & Co., Limited, the said Smith being president, the said Rumsey being treasurer, and the said Gignoux being secretary thereof (Tr., p. 122); (4) that for the purpose of protecting the interests of the said Benson, Smith & Co., in the event of the death of any of the said Rumsey, Smith and Gignoux, the said Rumsey, Smith and Gignoux agreed to take out a policy of insurance in the sum of $5000 on their respective lives in favor of the corporation, and that in accordance with said agreement the policies of insurance so taken out were placed in the custody and possession of Benson, Smith & Co., the beneficiary named in each of said policies (Tr., p. 122); (5) that said applications were accepted by said New York Life Insurance Company and policies issued thereon, which were executed at the home office of said company at New York and delivered to Benson,

Smith & Co. at Honolulu (Tr., pp. 123, 124); (6) that the policy so issued to the said Samuel L. Rumsey provided that "The insured, having reserved the right, may change the beneficiary or beneficiaries, at any time during the continuance of this policy, by written notice to the company at the home office, provided this policy is not then assigned. * * * No designation, or change of beneficiary or declaration of an absolute beneficiary, shall take effect until endorsed on this policy by the company at the home office (Tr., p. 125)"; (7) that after the execution and delivery of said policies Benson, Smith & Co. paid and continued to pay all premiums due thereunder (Tr., p. 127); (8) that at the time of the delivery of said policies the said Smith owned 363 shares, the said Rumsey owned 100 shares and the said Gignoux owned 30 shares of the capital stock of the corporation out of a total of 500 shares issued (Tr., p. 127); (9) that on August 31, 1906, the complainant, Emma F. Rumsey, and the said Samuel L. Rumsey were married at Denver, Colorado, and thereafter lived there until the death of Rumsey (Tr., p. 128); (10) that on July 9, 1907 Rumsey transferred his said 106 shares of said capital stock to the complainant and shortly thereafter she sold 50 shares thereof to Benson, Smith & Co., and after the death of said Rumsey the complainant sold the remaining 50 shares to said company (Tr., p. 128); that in January, 1904, Samuel L. Rumsey left the Territory of Hawaii and was never again actively connected with Benson, Smith & Co., or its business, and in February, 1905, he ceased to hold the office of treasurer and never

thereafter drew any salary or compensation from the company (Tr., pp. 128, 129); (11) that until the recovery of judgment by Benson, Smith & Co. against the New York Life Insurance Company for the amount of said policy, Benson Smith & Co. held said policy, claiming the right to hold the same under and by virtue of the agreement relating thereto above referred to (Tr., pp. 129, 130); (12) that no change of beneficiary was ever at any time endorsed upon the policy though a request to have Emma F. Rumsey so named in place of Benson, Smith & Co. was made by Samuel L. Rumsey on July 9, 1907, the reason being that the policy did not accompany the request, since Benson, Smith & Co. held possession of it under the claim that it was entitled to possession of the policy and to the proceeds thereof in the event of the death of Rumsey (Tr., pp. 255, 256); that on June 11, 1910, the complainant caused to be remitted to the New York Life Insurance Company, the amount of the annual premium upon said policy, but it had already been paid by Benson, Smith & Co., and was thereupon tendered back to the complainant, who refused to accept it, and it was finally paid into court in an action instituted by the complainant against the New York Life Insurance Company in the District Court of the City and County of Denver, Colorado, where it has since remained (Tr., pp. 268, 272); (13) that the said Samuel L. Rumsey died at Los Angeles, California, on July 27, 1910, leaving the complainant his lawful wife (Tr., p. 302); that on August 15, 1910, proofs of death were presented to the New York Life Insurance Company by the com-

plainant on forms furnished to the complainant by the company (Tr., p. 302); (14) that the company has at all times refused to pay the amount of the policy or any part thereof to the complainant (Tr., p. 306); (15) that on August 15, 1910, said Emma F. Rumsey instituted suit against the insurance company in the Denver court to recover the amount of the policy, but her complaint was dismissed, and the judgment was affirmed by the Supreme Court of Colorado; *Rumsey v. New York L. I. Co.,* 147 Pacific 337 (Tr. pp. 314-320); and (16) that on February 24, 1913, said Benson, Smith & Co. recovered judgment against the New York Life Insurance Company for the amount of the policy, with interest and costs, which the company paid (Tr., pp. 375, 376, 384).

The circuit judge rendered a written opinion (Tr. pp. 404-432) upon which a decree was entered awarding judgment against the New York Life Insurance Company for the sum of $5000, with interest from August 15, 1910, and costs; decreeing Benson, Smith & Co. trustee for the complainant with respect to the proceeds of the judgment recovered by it against the insurance company; awarding judgment against Benson, Smith & Co. in the sum of $5959.55, with interest from April 3, 1913, less the sum of $1858.40, with interest from the date of the payments by it of premiums on the policy, and costs; and providing that the complainant should first have recourse against Benson, Smith & Co. (Tr., pp. 433-436). From that decree the respondents appealed to the Supreme Court of Hawaii (Tr., p. 437) and obtained a reversal (Tr., pp. 442-452). The

decree was entered on October 2, 1919, remanding the cause to the circuit judge for further action compatible to the decision of the Supreme Court (Tr., p. 453). From that decree this appeal has been taken (Tr., p. 454), and the record does not show what further proceedings were had in the court below to which the cause was remanded.

II.

ERRORS RELIED UPON BY APPELLANT.

The errors relied upon by appellant (Rec., p. 456; Appellant's Brief, pp. 9-11) may be included in two groups:

(1) The Supreme Court of Hawaii erred in holding that the Drug Company ever had an insurable interest in the life of Rumsey, or that if such interest ever existed, in not holding that it ceased at the time Rumsey severed his connection with the Drug Company.

(2) The Supreme Court of Hawaii erred in holding that the Drug Company was the absolute beneficiary under the policy in suit, and in not holding that Emma Forsyth Rumsey, complainant-appellant, was the sole beneficiary at and after the time of Rumsey's death.

III.

POSSIBLE POSITIONS OF THE PARTIES.

While appellant insists

> "that this insurance was taken out by the corporation acting through its dominating and controlling member, George W. Smith, and was not taken by the insured",

there are two possible views of the position of the parties:

(1) That Rumsey took out the policy upon his own life, named the Drug Company as beneficiary and assigned the policy to it, and the Drug Company paid all of the premiums.

(2) That the Drug Company took out the policy in its own favor and paid all the premiums thereon.

Appellant, while persisting in the latter view, has confused the two in her argument and particularly in the cases cited on pages 67 to 70 of her brief.

IV.

THE QUESTION OF INSURABLE INTEREST.

A. The policy was taken out pursuant to an oral agreement between the three principal officers and stockholders of the Drug Company to protect that corporation against loss and to provide it with funds to repurchase his stock in the case of Rumsey's death.

Appellant contends (Brief, p. 10 "V") that Benson, Smith & Co., Ltd., had no insurable interest in the life of the insured and that it is against public policy to allow them, or it, as the case may be, to

become the owner of insurance on his life. This contention raises the questions of who took out the insurance on the life of Samuel L. Rumsey and what constitutes an insurable interest in human life.

In reality, as the discussion herein will show, and as was suggested by Mr. Justice Hill of the Supreme Court of the State of Colorado in the case of

Emma F. Rumsey v. New York Life Insurance Co. et al., 59 Colo. 71; 147 Pac. 337,

on error to the District Court of the City and County of Denver (Rec., p. 48):

"There is no such an issue involved in this case."

The ground for such a statement must be that no matter which point of view is taken, that is to say, whether the insurance policy in question was taken out by Samuel L. Rumsey upon his own life, or by Benson, Smith & Co., Ltd., upon the life of Samuel L. Rumsey, there was an insurable interest in the life insured.

But before discussing the merits of this contention, a brief review of the circumstances under which the policy in question was issued and its purpose is pertinent. This being an equitable appeal, the case is before the court upon the facts as well as the law, and the stipulation as to the agreed statement of facts may be considered by the court to be in evidence in the cause in so far as the same or any part or portion thereof may be material to the issues in the cause, or relevant thereto (Rec., p. 117).

In 1903, and prior to the application for the policy involved herein, it was agreed between the three

principal officers, directors and stockholders of Benson, Smith & Co., Ltd., namely, George W. Smith, president and manager, Alexis J. Gignoux, secretary, and Samuel L. Rumsey, treasurer, thereof, that each should insure his life in the sum of $5000 at the expense and for the benefit of Benson, Smith & Co., Ltd., that concern being named as the beneficiary in each policy. At that time the stock of said corporation was held as follows: By George W. Smith, 363 shares; by Samuel L. Rumsey, 100 shares; by Alexis J. Gignoux, 30 shares, the remaining seven shares being held by several other parties, the initial capitalization having been $50,000.

After the execution and delivery of the three policies, the Drug Company paid all the premiums on the policies, and particularly paid the premiums due the New York Life Insurance Company on the Rumsey policy.

The object of this insurance was to protect the corporation against a sudden demand for funds in the event of the death of any one of the principal stockholders; in the language of the Supreme Court of Hawaii (Rec., p. 448):

> "The purpose of the insurance was to protect the interests of Benson, Smith & Co., Limited, against a sudden demand for funds in the event of the death of any of the three men, they virtually owning the entire business."

Appellant denies that such an agreement existed (Appellant's Brief, p. 48) and contends that Rumsey was compelled to take out the policy. While the record shows (Rec., p. 159) that Mr. Smith suggested that each

of the principal stockholders should insure his life for the benefit of the corporation, there is no element of threat or of a refusal to comply with the suggestion in the entire transaction. On the contrary, the depositions which form part of the agreed statement of facts, and which are the only evidence on that point, unanimously support the contention that there was a voluntary agreement between the three principal stockholders. The fact that the insurance policies were all for an equal amount, while the number of shares of each of the principal stockholders was unequal, cannot cloud the legitimacy of the purpose of the insurance. Five thousand dollars would not have been sufficient to buy either Mr. Smith's or Mr. Rumsey's stock, but it would and did guarantee the corporation available funds to that extent which it might or might not otherwise have had, depending on its financial condition at the time of the death of the insured member.

In his deposition (answer to direct interrogatory No. 15, Rec., p. 192), Mr. Smith testified as follows:

> "At the time the policies were issued Mr. Gignoux was the secretary of the corporation and I was its president and manager. Before the policies were taken out the matter was fully discussed between Mr. Rumsey, Mr. Gignoux and myself upon one or more occasions. I do not remember the full details of the conversations but I do know that I said to both of them that it was my desire that such policies should be taken out in favor of Benson, Smith & Co., Ltd., in order that the corporation, which was a close corporation, might be protected in the event of the death of any of its officers. I also stated to them that *the purpose of such insurance was to provide the company with funds so*

that in the event of any such death it could purchase the stock of the deceased and thus prevent the stock going on the open market, having always been a close corporation it was my purpose to maintain it as such in order to prevent outsiders and competitors from acquiring any interest in the Company. Both Mr. Rumsey and Mr. Gignoux in these conversations stated that they agreed that the plan was an excellent one and both assented to the proposal, and they as well as myself accordingly made application for such insurance."

Mr. Gignoux, answering direct interrogatory No. 7, Rec., p. 229, testified similarly (Rec., p. 233):

"Yes, there was such a conference between Mr. Smith, Mr. Rumsey and myself. I do not remember the exact conversation as it was so long ago, but I do remember that at that time Mr. Smith stated that he desired that we should have our lives insured in favor of Benson, Smith & Co., Ltd., and that Benson, Smith & Co., Ltd., would pay all of the premiums. *He stated that his reasons for wishing us to do so were in order to protect Benson, Smith & Co., Ltd., in case of the death of any of us so that the firm would be in position to purchase the stock of each of us so dying, thereby carrying out the policy of the company to remain a close corporation, and thus preventing outsiders and competitors from becoming stockholders in the company.* Both Mr. Rumsey and myself expressed our approval and consented to have our lives insured, in accordance with the plan set forth by Mr. Smith. All of his conversation took place in the presence of Mr. Rumsey."

The application to the New York Life Insurance Company ("Exhibit A", Rec., p. 22) shows that the person applying for the policy in question was Samuel Louis Rumsey. It appears, then, that Samuel Louis Rumsey

took out the insurance at the request of George W. Smith, president of Benson, Smith & Co., Ltd., upon his (Rumsey's) own life (Rec., p. 215) and that he named Benson, Smith & Co., Ltd., as the beneficiary therein.

(Record, p. 23):

> "To whom is the insurance applied for to be payable in event of death?
>
> "A. To the firm of Benson, Smith & Co., Ltd., or its legal representatives."

(Record, p. 27, Exhibit "B"):

> "New York Life Insurance Company agrees to pay five thousand dollars, to the firm of Benson, Smith & Co., Ltd., or its legal representatives or to such beneficiary as may have been duly designated, at the Home Office of the Company, in the City of New York, immediately upon receipt and approval of proofs of the death of Samuel L. Rumsey, the insured, of Honolulu, in the Island of Oahu, Hawaii."

Furthermore, the testimony of William Amon Purdy, agent of the New York Life Insurance Company, shows that Samuel L. Rumsey understood that he was taking out the said insurance policy upon his own life, not "on his own account" but for the benefit of Benson, Smith & Co., Ltd.

William A. Purdy, in answer to direct interrogatory No. 21 (Rec., p. 241), said (Rec., p. 251):

> "Yes, after Mr. Rumsey had been examined for the corporation insurance in favor of Benson, Smith & Co. *I suggested that he* had passed a good examination and *had better take out a policy on his own account. He said no, that he was a bachelor, never*

expected to marry and called my attention to the longevity of his family, as evidenced in the medical examination and *said that he did not care to do any life insurance* business on his own account."

B. Assumption that Samuel L. Rumsey took out the Policy of Insurance.

(1) Insurable interest of every man in his own life.

Assuming in the first place that Samuel L. Rumsey took out the said life insurance policy on his own life, as is evidenced by the insurance contract itself (Rec., p. 24), no question of insurable interest in the insured can arise. It is unquestioned that every man has an insurable interest in his own life.

1 Cooley, Briefs on Insurance, 252:

"That one has an unlimited insurable interest in his own life is an elementary principle, as to the existence of which the cases are unanimous."

Vance on Insurance, 128:

"It would be more accurate to say that the question of insurable interest is immaterial when the policy is upon the insured's life."

Afro-American Life Ins. Co. v. Adams, 195 Ala. 147; 70 So. 119:

"The insured has an unlimited insurable interest in his own life, so that any one may take out a policy on his own life and make it payable to whom he will."

(2) Insurable interest in beneficiary not necessary.

It being established that Samuel L. Rumsey had the right to take out a policy of insurance upon his own life, did he have the right to name Benson, Smith

& Co., Ltd., as the beneficiary therein? Must the beneficiary have an insurable interest as well as the person procuring the insurance?

An examination of the authorities sustains the conclusion that no insurable interest in the beneficiary is now necessary; but on the contrary one may insure his own life in favor of whomsoever he may choose to make his beneficiary, irrespective of any insurable interest in the beneficiary.

Vance on Insurance, 128:

"It is uniformly held that the mere fact of a man's insuring his own life to the benefit either of himself or another is sufficient evidence of good faith to validate the contract. *It is not at all necessary that the person designated as beneficiary in such policy shall have any interest in the life insured.*"

25 L. R. A., 627:

"With one or two possible exceptions, the courts all agree that in case the transaction is bona fide, a person may take out insurance upon his own life for the benefit of one having no insurable interest in his life, and that the latter may collect and hold the amount which becomes due upon the policy."

1 Cooley, Briefs on Insurance, 252:

"It follows, therefore (from the fact that one has an insurable interest in his own life), that one may take out a policy of insurance on his own life and make it payable to whom he will. It is not necessary that the person for whose benefit it is taken should have an insurable interest."

Mutual Benefit Life Insurance Co. v. Cummings, 66 Or. 272; 133 Pac. 1169, 1171:

"It is a settled law of this country that a person has a right to insure his own life and have the money made payable to any person whom he may desire whether such beneficiary has an insurable interest in his life or not."

In

Reed v. Provident Life Assur. Soc., 190 N. Y. 111; 82 N. E. 734,

the New York Court of Appeals says:

"But a person may insure his own life and provide in the contract of insurance that the money shall be payable to any one whom he may appoint or assign the policy to."

In

Dolan v. Supreme Council, 152 Mich. 266; 116 N. W. 383,

the Supreme Court of Michigan says:

"The authority of these cases (referred to in the opinion) and their reasoning warrants the statement that the rule of public policy which forbids one insuring a life in which he has no insurable interest, does not prevent his being made a beneficiary in an insurance policy secured by the insured."

1 Page on Contracts, 600:

"As a person has an insurable interest in his own life, he may insure his life for the benefit of another who has no insurable risk therein."

14 R. C. L., 920:

"There can be no doubt that every person has an insurable interest in his own life and that he may

insure it for the benefit of any person whom he sees fit to name as beneficiary."

25 Cyc., 708:

"Every person has an insurable interest in his own life which will support a policy taken by him in favor of himself or his estate. *And there is no reason of public policy why one who procures insurance on his own life should not make the benefit payable to another without regard to whether the latter has any insurable interest. In the absence of bad faith or fraud, the policy may be made payable to any one without regard to insurable interest, and recovery may be had on the policy in an action brought by the beneficiary without proof of insurable interest.*"

Under these authorities it is clear that Samuel L. Rumsey could have named Benson, Smith & Co., Ltd., as beneficiary, irrespective of its interest in his life.

(3) Nor does the payment of the premiums by a beneficiary or assignee without an insurable interest void the policy.

It is suggested that because the Drug Company paid the premiums, the contract of insurance was necessarily one of wager and hence illegal because against public policy. The modern authorities establish the rule, however, that the mere circumstance of the payment of the premiums by the beneficiary or assignee does not make the policy illegal even though such beneficiary or assignee has no insurable interest.

1 Bacon Life & Accident Insurance, 577, 597:

"The right of a man to insure his own life and make the policy payable to whomsoever he chooses irrespective of the question of insurable interest has

never been doubted, but the transaction must not be a cover for a speculation and wager, contravening the general policy of the law * * *. *The mere fact that the premium is paid by a third party who is payee of the policy, however, does not make the contract a wagering one.*"

"In a recent case the court of Civil Appeals of Texas thus states the rule: 'The fact that the premium was paid by the beneficiary does not give to the contract the character of a wagering contract; nor does the fact that the beneficiary has no insurable interest in the life of the assured render the policy void as against public policy.' "

1 Cooley, Briefs on Insurance, 261:

"Whatever may have been the rule at common law, it is now settled that a life insurance policy to be valid must be based on an insurable interest on the part of the person procuring the insurance, in the life insured. The weight of authority is that one may take out insurance on his own life for the benefit of one having no insurable interest in the life insured."

In other words, so long as a policy is not a wager policy, it is immaterial who pays the premiums.

In

Aetna Life Ins. Co. v. France, 24 L. Ed. 288; 4 Otto 561-567,

the court said:

"We hold that where as in this case a brother takes out a policy on his own life for the benefit of his sister (that is, where there is no wager element), it is totally immaterial what arrangement they choose to make between them about the payment of the premiums. The policy is not a wager policy. It is divested of those dangerous ten-

dencies which render such policies contrary to good morals."

In

Fidelity Mutual Life Ass'n v. Jeffords, 107 Fed. 402, 410,

one Martin A. Jeffords applied for and obtained the policy on his own life and directed who should be the beneficiaries. His wife was to receive three thousand dollars and his brother, Thomas C. Jeffords, ten thousand dollars. The first premium was paid out of the money of Martin A. Jeffords. The other premiums were paid by Thomas C. Jeffords for his brother and the insurance company receipted for the money as paid by Martin A. Jeffords, the court said:

> "The fact that Thomas C. Jeffords paid the premiums did not invalidate the policy. On the facts stated it was not a wager policy. A man may take out a policy of insurance upon his life for the benefit of his brother and *it is immaterial what arrangement is made between them for the payment of the premiums.*"

(4) Insurable interest in assignee not necessary.

If we admit that Rumsey took out the policy in favor of the Drug Company, which view is sustained not only by the depositions and application for the policy already referred to, but also by the policy itself, then we must assume that there was an initial assignment to Benson, Smith & Co., Ltd., by which the policy passed into its possession when issued. As suggested, it will be shown that the Drug Company had an insurable interest in Rumsey's life, but the weight of authority now

is that an assignment is valid, irrespective of any insurable interest in the assignee.

Mutual Life Ins. Co. v. Allen, 138 Mass 24:

"A policy of life insurance issued to one having an insurable interest may be assigned to another having no interest."

St. John v. American Mutual Life Ins. Co., 13 N. Y. (3 Kern) 31:

"It is not necessary that the assignee of a policy should have an insurable interest in the life of the insured in order to recover on the policy."

3 L. R. A. (N. S.), 936:

"The general theory is that an assignment to any person is valid in the same manner and to the same extent as an assignment of any other chose in action would be, and the assignee takes the entire interest of the policy."

19 Am. & Eng. Ency. of Law., 92:

"The only question that has been raised in respect to the capacity to take a life insurance policy by assignment or other transfer is in connection with the question of insurable interest. It is held in some jurisdictions that an assignee of a life insurance policy must have an insurable interest in the life of the insured, *but the prevailing doctrine is that no such interest is necessary."*

If the assignment were a mere cover for a wager policy, it would be void, but such is not the present case.

Vance on Insurance, 140-141:

"On principle, and according to the clear weight of authority, an assignment of a life policy to one having no insurable interest therein is perfectly

valid if made in good faith and not as a cover for fraudulent speculation in life."

In

Eckel v. Reimer, 41 Ohio St. 232; 99 N. E. 301,

it was held that

"One who has obtained a valid insurance upon his own life may dispose of it as he may see fit in the absence of prohibitory legislation or contract stipulation. It is immaterial in such case that the assignee has no insurable interest."

That such is the prevailing rule and that it is based upon sound reasons is amply borne out by the citations in the opinion of the court by Mr. Justice Holmes in

Grigsby v. Russell, 222 U. S. 149; 56 L. Ed. 133.

In

Olmsted v. Keyes, 85 N. Y. 593, 600,

the court reiterates the principle that a policy, valid in its inception, may be assigned to any person, whether he has an insurable interest or not.

"The rule, as gathered from these authorities, is that where one takes out a policy upon his own life as an honest and *bona fide* transaction, and the amount insured is made payable to a person having no interest in the life, or where such a policy is assigned to one having no interest in the life, the beneficiary in the one case and the assignee in the other may hold and enforce the policy if it was valid in its inception, and the policy was not procured or the assignment made as a contrivance to circumvent the law against betting, gaming and wagering policies. It follows, therefore, that one may, with the consent of the insurer, deal with a valid life policy as he could with any other chose in action, selling it, assigning it, disposing of it, and bequeathing it by will, and it has been well

> said that if he could not do this life policies would be deprived of a large share of their utility and value."

So in the case of

Gordon v. Ware National Bank, 132 Fed. 444,

the Circuit Court of Appeals for the Eighth Circuit has held that an insurable interest in the assignee is not requisite to the validity of the assignment of a policy of life insurance lawfully issued to one who had such interest if made in good faith.

Furthermore, this policy was assigned to Benson, Smith & Co., Ltd., and came into its possession and control in pursuance of the agreement already set forth. The protection to the corporation itself, of which Rumsey was a principal member, and the payment of the premiums by it, were the considerations for his promise to insure his life in favor of the corporation. Rumsey had no right to violate the terms of the agreement in accordance with which he took out the insurance. Benson, Smith & Co., Ltd., never parted with the possession of the policy, and from the beginning of the controversy showed that it considered itself the owner of the policy.

(Letter September 25, 1907, Smith to Rumsey, Rec., p. 162:)

> "In conclusion, I beg to say that, as President and Manager of this Corporation, I decline to place in your possession the Policy in question or to entertain any financial proposition for its transfer until the stock which it covers is wholly retired."

(Letter of Drug Co. to Insurance Co., Sept. 27, 1907, Rec., p. 162:)

> "We beg to notify you that we are holders of, and beneficiaries under, Policy #3442989, in the New York Life Insurance Company, on the life of Samuel L. Rumsey.
>
> "We beg to notify you that this firm has always paid and will continue to pay, the Premiums on the above Policy, and that all notices relative thereto are to be sent to the undersigned.'

(Letter from Drug Co. to Mrs. Emma F. Rumsey, Dec. 14, 1910, Rec. p. 179):

> "The policy on your husband's life having been taken out in the name of the Company and for the Company's benefit and all of the premiums having been paid by the Company, it does seem to me only just that it should receive the amount of the policy. With the advice you have, you will necessarily hold the view you have; and therefore, as you state, the insurance matter is 'closed until the court determines who is right about it'. There is another reason why the question should be settled by the court: The Company holds other policies which were issued under the same conditions and for similar purposes, and it seems to be the prudent thing to have the question settled, once for all, whether or not the Company is to receive the benefit of moneys it expends for premiums on these policies or some other persons. Under these circumstances, you will see that it is impossible for the Company to withdraw its claim to the moneys payable pursuant to the policy which you ask it to do."

As stated by the Supreme Court of Hawaii (Rec., p. 449):

> "If the policy was taken out by Rumsey for the benefit of Benson, Smith & Company, Limited, it to pay the premiums under an agreement between the

three stockholders in said corporation, Smith, Rumsey and Gignoux, that each of the other stockholders, Smith and Gignoux, at the time take out similar policies, which they did, Rumsey would not afterwards be any more at liberty to change the beneficiary under said policy than he would have been to change an assignee to whom he had assigned a policy on his life for a valuable consideration.

"From this view of the case, which is entirely compatible with the records, the decision of the trial judge cannot be sustained."

Moreover, by the terms of the policy itself there could be no change of beneficiary in case the policy was assigned (Rec., p. 27). The assignment was an oral one, completed by the delivery of the policy to Benson, Smith & Co., Ltd., which was, however, sufficient to constitute a valid assignment.

19 Am. & Eng. Ency. of Law, 93, 94:

"The assignment need not necessarily be in writing, but may be by parol, so as to pass the equitable title by a mere delivery of the policy with intent to assign. But the delivery must be with intent to transfer the title. Any stipulations in the policy concerning the method of assignment are for the protection of the insured merely, and do not constitute a part of the essence of the contract, and a noncompliance with them will not invalidate the assignment as between the parties."

19 Am. & Eng. Ency of Law, 96:

"Where the assignment is absolute, the assignee may recover and retain the whole amount of the policy upon the death of the insured, without reference to the amount of consideration paid by him for the policy."

Mutual Benefit Life Ins. Co. v. Swett, 222 Fed. 200, 205:

> "However, the assignment of the policy and change of beneficiary are not the same but different things. *Assignment is the transfer by one of his right or interest in property to another.* It rests upon contract and generally speaking the delivery of the thing assigned is necessary to its validity. The power to change the beneficiary is the power to appoint. The power of appointment must be exercised in the manner agreed upon in the contract of insurance."

Under the assumption that Samuel L. Rumsey procured the insurance on his own life, making Benson, Smith & Co., Ltd., the beneficiary, the policy was assigned to Benson, Smith & Co., Ltd., at the time it was issued and with the assignment Rumsey's interest in it was transferred to the corporation and was not to be divested by any future act of Rumsey contrary to the terms of the oral agreement. The Drug Company had a contractual interest in the policy; therefore, its withholding of the policy was not wrongful and it cannot be said that the Drug Company had a right to the policy only so long as such was the intention of Rumsey. A court of equity must look through the contract to ascertain the real intention of the parties, which in the instant case was to make the Drug Company the owner of the policy.

So far as the beneficiary or assignee is concerned, the emphasis in such cases as the present one should be put upon good faith—lack of wager element—instead of upon insurable interest. The question of insurable

interest should be confined entirely to the person procuring the insurance; this is undoubtedly the modern view as shown by the cited cases.

> *Reed v. Provident Savings Life Assur. Society,* 190 N. Y. 111; 82 N. E. 734, 736:
>
> "If the insurance is made upon the application of one who has no insurable interest whatever in the life insured, it is a wager policy—that is to say, a speculative contract—which the law condemns. But a person may insure his own life and provide in the contract of insurance that the money shall be payable to any one whom he may appoint, or assign the policy to. *What will distinguish the one contract from the other is the fact as to the party actually contracting with the insurer and the distinction is substantial and controlling accordingly.*"

Those cases which require an assignee or beneficiary to have an insurable interest as well are based upon the old idea that a life insurance policy is a contract of indemnity. It is now settled that it is not a contract of indemnity, but

> "a contract to pay a certain sum of money upon the death of a person in consideration of the due payment of a certain annuity for his life."
>
> *Olmstead v. Keyes,* 85 N. Y. 593, 598.

So that under this conception of the position of the parties, Rumsey had the right, irrespective of any insurable interest in the Drug Company, to insure his life in its favor and to assign the policy to it in pursuance of the agreement under which it was procured, and having assigned it to the Drug Company, he had no power to change the beneficiary and so violate his con-

tract with Benson, Smith & Co., Ltd., notwithstanding the change of beneficiary clause contained in the policy.

As stated by the court in the case of

McEwen v. New York Life Ins. Co. (Cal. 1919), 29 C. A. D. 181; 183 Pac. 373,

in discussing insurance policies in which the right to change the beneficiary is reserved:

> "*Our conclusion is that an insurance policy containing the provision under consideration may be the subject of a gift to the beneficiary named therein, whose interest in expectancy, by virtue of the gift, is changed to an absolute interest (in the donee) without qualification, and thereafter the donor, in the absence of some act again vesting him with title, has no power or control over the policy.* The interest of the donee, though named as beneficiary, is not by virtue of such fact, but the qualified interest is merged in the absolute interest due to the completed gift."

C. Assumption that Benson, Smith & Company, Limited, took out the policy of insurance on the life of Samuel L. Rumsey.

The conception of the position of the parties discussed supra (IV. B) is not that contended for by appellant's counsel. His theory of the case is that the Drug Company procured the insurance on the life of Rumsey and that it had no insurable interest therein, and hence the policy was a wagering one (Appellant's Brief, pp. 10, 39, 65):

> "The real question here is, has a corporation an insurable interest in the life of a stockholder, an interest which permits the corporation to insure the life of the stockholder as a wife may insure the life of a husband?

"That this insurance was taken out by the corporation, acting through its dominating and controlling member, George W. Smith, and was not taken out by the insured, is so conclusively demonstrated in the agreed statement of facts that attention need only be called to these facts. Argument and construction are unnecessary."

Remembering again that the case is in a court of equity and that equity will look through the written contract, let us now assume that in reality Benson, Smith & Co., Ltd., did take out this policy with Rumsey's consent. Here again the question of insurable interest arises.

(1) What constitutes an insurable interest in human life? Discussion of wager policies.

Vance on Insurance, 129:

"'An insurable interest exists whenever the relation between the assured and insured whether by blood, marriage *or commercial intercourse,* is such that the assured has a reasonable expectation of deriving benefit from the continuation of the life insured, *or of suffering detriment* or incurring liability through its termination.'"

Vance on Insurance, 136, 137:

"Any person is permitted to protect by insurance any commercial interest he may possess in the life of another. * * * The life of one only indirectly connected with a commercial enterprise may be insured by those involved in it if the death of such person would injuriously affect the enterprise, as in the recent instances of insurance on the life of the King of England procured by those who had invested money in preparations for the King's coronation."

May on Insurance, Sec. 76:

"It may be said generally, however, that while the earlier cases show a disposition to restrict it (insur. int.) to a clear, substantial, vested pecuniary interest, and to deny its applicability to a mere expectancy without any vested right, the tendency of modern decisions is to relax the stringency of the earlier cases, and to admit to the protection of the contract whatever act, event, or property bears such a relation to the person seeking insurance that it can be said with a *reasonable degree of probability to have a bearing upon his prospective pecuniary condition.*"

25 Cyc., 706:

"Where there are no ties of blood or marriage between the person whose life is insured and the person who procures the policy on such life there must be some pecuniary interest of the latter in the life of the former to sustain the insurance. *But an indirect advantage is sufficient, and a moral obligation will support the policy. It is enough that in the ordinary course of events pecuniary loss or disadvantage will naturally and probably result from the death of the one whose life is insured to the person obtaining the policy.* While some courts have been inclined to limit the amount of the insurance to the actual pecuniary interest, the general inclination seems to be to support the policy, although the amount of the pecuniary interest is less than the amount of the policy, unless the interest is so disproportionately small as to show the contract to be a mere wager."

There is not a suggestion in the evidence that even raises an inference that the policy was intended as a wagering transaction. On the contrary, the facts show that it was bona fide and consummated with the

honest purpose of protecting the corporation, of which Rumsey was a principal member, against loss in the event of his death. Benson, Smith & Co., Ltd., did have "a reasonable expectation of suffering detriment or incurring liability" through the determination of the life of Samuel L. Rumsey—the purpose of the insurance being, as already pointed out, to provide available funds with which to purchase the stock of any one of the officers and principal stockholders in the event of his death, and thus keep the corporation a close one.

If the Drug Company took out the policy of insurance and had no insurable interest in Rumsey's life, then the policy is void and there can be no recovery thereon.

If this were a wagering contract, as appellant contends, but we do not concede, it could not be enforced between the parties. The law as it now stands on the question of insurable interest may be summarized as follows:

The person *procuring the policy* must have an insurable interest in the life insured. Neither beneficiary nor assignee need have an insurable interest, and either may recover upon the policy because it was valid in its inception; that is, each person has a right to insure his own life in favor of whom he will.

Certain courts, however, have held the minority view, that the beneficiary or assignee must have an insurable interest in the life insured, and accordingly have permitted a recovery by the personal representative of the insured of the amount of the policy over and above

the consideration which the beneficiary or assignee may have paid.

But no decisions have come to our attention which hold that where the party taking out the policy had no insurable interest that any recovery could be had thereon. *Where the policy is procured by one who has no insurable interest in the life insured, the policy itself is void as against public policy; there is no contract at all, and there can accordingly be no recovery.* In such a case, "the court is neutral between the parties".

This well settled rule was applied in

Security Mutual Life Ins. Co. v. Little, 119 Ark. 498; 178 S. W. 413.

> "Accepting the view of the law that the courts should not lend their aid to any party to a contract which is void as against public policy, either by enforcing its provisions, on the one hand, or by permitting the recovery of money paid in the performance of its conditions, on the other, we must hold that this suit cannot be maintained, and the judgment of the court below will therefore be reversed, and the cause will be dismissed."

25 Cyc. 702.

> "Some courts have said that in the absence of any specific statute, such as that found in England, a mere wagering contract of life insurance is not necessarily invalid, but *by the great weight of authority in this country wagering contracts are invalid, and on this ground a life insurance contract not supported by an insurable interest is void as against public policy.*"

If Benson, Smith & Company, Limited, as appellant contends, took out this policy on the life of Samuel L. Rumsey, and had, as appellant contends, no insurable

interest in his life, the policy is void, and neither appellant nor anyone else can recover upon it. If, in fact, the Drug Company took out this policy, how is Rumsey a party to it, and what right can he or his representative in any capacity have under it? All the parties thereto being *in pari delicto,* the law will leave them as they find themselves. And as Bacon says (*1 Bacon Life & Accident Insurance,* 598):

> "* * * the fact that one of the parties has seen fit to pay over to the other the wage does not afford a basis in equity for outside parties to lay claim to the reward of inequity".

APPELLANT'S CASES ON INSURABLE INTEREST.

An examination of the cases cited and quoted from by appellant (Appellant's Brief, pp. 65-70), sustains this view. They may be divided into two groups.

(1) Those which hold that if the person who *procures* the policy of insurance is without insurable interest, the policy is a wagering one and therefore is void.

Ruse v. Mut. Benefit Life Ins. Co. (1861), 23 N. Y. 516, 523, 526;

Wilton v. New York Life Ins. Co., 34 Tex. Civ. App. 156; 78 S. W. 403;

Gordon v. Ware National Bank, 132 Fed. 444;

Continental Life Ins. Co. v. Volger (1883), 89 Ind. 572;

Helmtag's Adm'r. v. Miller, 76 Ala. 183.

(2) Those which hold that where the policy is procured by one with insurable interest, but assigned to one without such an interest in the life insured, the assignment is void beyond the debt which it was transferred to secure, although recovery is allowed on the policy by the representatives of the insured, because the policy itself is valid.

Victor v. Louise Cotton Mills, 148 N. C. 107; 61 S. E. 648;

Cheeves v. Anders 87 Tex. 287; 28 S. W. 274;

Gilbert v. Moose's Adm'r. (1883), 104 Pa. St. 74;

Schlamp v. Berner's Adm'r. (Ky. 1899), 51 S. W. 312;

Tate v. Com. Bldg. Ass'n. (1899), 97 Va. 74; 33 S. E. 382;

Dugger v. Mut. Life Ins. Co. of New York (1904), 81 S. W. 335;

Heusner v. Mut. Life Ins. Co. (1891), 47 Mo. App. 336;

Quillian v. Johnson, 122 Ga. 49; 49 S. E. 801;

Barbour's Adm'r. v. Larue (1899), 106 Ky. 546; 51 S. W. 5;

Schonfield v. Turner (1889), 75 Tex. 324; 12 S. W. 626;

Trinity College v. Travelers' Ins. Co. (1893), 113 N. C. 244; 18 S. E. 175;

Missouri Valley Life Ins. Co. v. Sturges (1877), 18 Kas. 93.

If, then, under appellant's view of the position of the parties, Benson, Smith & Company, Limited, had no

insurable interest in the life of Samuel L. Rumsey, the policy is absolutely void and there can be no recovery thereon.

(2) Did Benson, Smith & Company, Limited, have an insurable interest in the life of Samuel L. Rumsey?

That a corporation has an insurable interest in the life of one of its officers and principal stockholders is unquestioned by the authorities.

In

Mutual Life Ins. Co. v. Board, Armstrong & Co.,
115 Va. 836; 80 S. E. 565,

an action was brought by the plaintiff corporation to recover of the defendant life insurance company the amount of a policy issued by it for the benefit of the plaintiff upon the life of B. F. Board, its president and general manager. The purpose of the insurance was to protect the corporation and its creditors from any loss by reason of his death. The insurance company, with full knowledge of all the facts, wrote and delivered the policy sued on. The principal ground upon which the defendant sought to void the policy was that plaintiff had no insurable interest in the life of B. F. Board. The court said:

> "Although it is well known that the leading insurance companies of the country solicit and carry the class of insurance here involved, we have been unable to find any decision directly in point. The principles, however, announced by the decisions and stated by the text-writers we think clearly show that the plaintiff had an insurable interest in the life of B. F. Board, its president and general manager."

In

Connecticut Mutual Life Ins. Co. v. Schaefer, 94 U. S. 457; 24 L. Ed. 251, 253,

it is said:

> "Indeed it may be said generally that any reasonable expectation of pecuniary benefit or advantage from the continued life of another creates an insurable interest in such life. The essential thing is, that the policy shall be obtained in good faith and not for the purpose of speculating upon the hazard of a life in which the insured has no interest."

14 R. C. L., 921.

> "A corporation has an insurable interest in the life of its officers and so has a person who has furnished funds to carry on the business."

2 Joyce on Insurance, 2029.

> "A corporation has an insurable interest in the life of a stockholder who owns a large proportion of the corporate stock and whose skill and experience are relied on to a great extent to make the corporation business successful. * * * A corporation has an insurable interest in the life of its president and incorporator on the ground of loss of service in the event of his death where the policy is taken out in good faith."

In

Lewis v. Palmer et al., 106 Va. 522; 56 S. E. 341,

the following language was used by the court:

> "Whenever there is such a relationship that the insurer has a legal claim on the insured for services or support, or when from the personal relation between them the former has a reasonable right to ex-

pect some pecuniary advantage from the continuance of the life of the other, *or to fear loss from his death,* an insurable interest exists."

In

Keckley v. Coshocton Glass Co., 86 Ohio St. 213; 99 N. E. 299.

in which the facts are in many respects similar to those of the instant case, the court said:

"The plaintiffs in error in both of these cases seem to have defended in the courts below, and to contend here, on the theory that a life insurance policy is merely a contract for indemnity, and therefore, upon the assumption that the policies were taken out to secure the company against loss of the services of Gainor by his death while connected with the company, *if an insurable interest ever did exist in the company, it ceased when Gainor severed his connection with the company;* and hence when Gainor died the proceeds of the one policy belonged to Gainor's estate and of the other policy to Gainor's wife, subject only to reimbursement to the glass company of the premiums paid thereon, with interest. This contention seems to us to be untenable for several reasons.

"In the first place, it is a misconception of the law to insist that a life insurance policy is a contract of indemnity merely. The later and better considered view is that a contract of life insurance is not a contract of indemnity, but is a contract to pay to the beneficiary, a certain sum of money in the event of death. 1 Joyce on Insurance, Sec. 26. *So that, if the policy was valid in its inception, and remained valid until its maturity, the beneficiary is entitled to the whole of the stipulated sum."*

These authorities establish the fact that the Drug Company had an insurable interest in the life of Rumsey, as one of its officers and principal stock-

holders. On this theory then, that Benson, Smith & Company, Limited, took out the insurance on Rumsey's life, it having an insurable interest therein, the policy belonged to them unquestionably and Rumsey had no right whatever to the policy and so no right to change the beneficiary therein.

Appellant admits that Benson, Smith & Company, Limited, did have such an interest in Rumsey's life at the time the policy was procured, but contends (Appellant's Brief, p. 10 "VI"):

> "That even if the holding of the nominal office of Treasurer of the corporation by the insured, at the time the policy was applied for and written, created such a relation between the Drug Company and the insured, as authorized the Drug Company to insure the life of deceased for its benefit or to 'require' that insured should take out a policy on his life for the benefit of, and at the expense of, the corporation, nevertheless, such relationship having terminated, long before the change of beneficiary was made by the insured, the supposed insurable interest had terminated, and although the reservation in the policy, by the insured, of the right to change the beneficiary might have been *suspended* during the time the insurable interest of the Drug Company existed, the reservation came into effect, *ex propre vigore,* immediately upon the cessation of the relation which created the insurable interest."

Such a contention is squarely opposed to the established principles of law, as laid down in the cases and texts on the subject, that if an insurable interest exists at the inception of the policy, it is not necessary to show its existence at the maturity of the policy.

Vance on Insurance, 141.

"The law requires an insurable interest only at the inception of the policy as evidence of good faith. The presence of such interest at any subsequent period is wholly immaterial."

Rawles v. American Life Ins. Co. (N. Y.), 36 Barb. 357.

"If the holder of a policy of insurance on the life of another had no insurable interest at the death, yet this will not invalidate the policy if it was valid at the time of inception."

Scott v. Dickson, 108 Pa. St. 6.

"Where one has an insurable interest at the time insurance is effected upon the life of another for his benefit, the fact that his interest ceased to exist prior to the insured's death will not deprive him of the right to receive the insurance money as against the personal representatives of the insured."

Appeal of Corson, 113 Pa. 438; 6 Atl. 213.

"It is wholly unnecessary to prove an insurable interest in the life of the assured at the maturity of the policy, if it was valid at its inception."

2 Joyce on Insurance, 1965.

"Although it was held at one time that in insurances on lives the insurable interest must exist at the time of the loss, it is now sufficient that there existed a valid interest at the time of effecting the insurance. The fact that such interest ceased before the death of the assured is immaterial, on the question of the right to recover, unless such be the necessary effect of the provisions of the instrument itself."

In

Wurzburg v. New York Life Ins. Co., 140 Tenn. 59; 203 S. W. 332,

Wurzburg was the general manager of the Specialty Manufacturing Company, and the defendant, the New York Life Insurance Company, issued a policy of insurance upon his life, payable to the defendant, the Specialty Manufacturing Company. The policy was secured in 1913 for the benefit of the Specialty Manufacturing Company while said Wurzburg was connected with it and carrying on and managing its business. It was charged that in 1915 Wurzburg was forced to and did sever his connection with the company. The administrator of the deceased sought to recover the proceeds of the policy, except such a sum as would be necessary to reimburse the Manufacturing Company for the amount of premiums paid by it and interest thereon. The court said:

> "A corporation is often quite dependent upon the services of particular officers for its prosperity. Under such circumstances, a corporation has an insurable interest in the life of such officer as the term 'insurable interest' is defined in Warnock v. Davis, supra, and Lane v. Lane, supra. *Since this contract was valid when made, it did not become subsequently invalid when Wurzburg's connection with the Manufacturing Company ceased* * * *. It follows that if the policy is valid when issued and remains valid until the death of the insured, the beneficiary is entitled to the whole of the insurance."

1 Cooley, Briefs on the Law of Insurance, 311.

> "The rule stated in general terms may then be said to be that if the policy is valid at its incep-

> tion because based on an adequate insurable interest, the existence of such interest at the maturity of the policy is unnecessary."

Connecticut Mutual Life Ins. Co. v. Schaefer, 24 L. Ed. 251, 254; 94 U. S. 457.

> "We do not hesitate to say, however, that a policy taken out in good faith and valid at its inception, is not avoided by the cessation of the insurable interest, unless such be the necessary effect of the provisions of the policy itself."

The rule that an insurable interest need only exist in the assured at the inception of the policy, and that its existence or non-existence at the time the policy matures is immaterial, is thus very definitely settled.

Such cases as

Warnock v. Davis, 26 L. Ed. 924; 14 Otto 775-783;

Cammack v. Lewis, 21 L. Ed. 244; 15 Wall. 643-649,

and others which follow their decisions, are not in point here. The transaction involved in the Warnock case was plainly a speculative one and the assignment was by way of cover for a wager policy. The facts showed that it was purely and simply a gamble on the life of an utter stranger.

Likewise, in

Cammack v. Lewis, supra,

the policy, which was for $3,000, was assigned to secure a debt of only $70, the assignee agreeing to pay the premiums. The court held that the debt secured was

out of all proportion to the amount of the policy and pronounced it a wagering contract.

In the case of

Grigsby v. Russell, 222 U. S. 149; 56 L. Ed. 133,

the Supreme Court questioned some of the remarks made in the opinion in *Warnock v. Davis, supra,* and the assignee was allowed to take the entire interest in the policy as against the personal representatives of the insured.

The Supreme Court of New Hampshire pointed out in the case of

Bank v. Comins, 72 N. H. 12; 55 Atl. 191,

that *Warnock v. Davis* is out of harmony with earlier and later decisions of the United States Supreme Court.

In

Finnie v. Walker, 257 Fed. 698,

the wagering element was present in the assignment of the policies—established by the fact that the assignee knew at the time of the assignment that the assignor "was a very sick man and that the amount of the contract compared with what was paid permitted playing for a large stake".

The Supreme Court of Hawaii, commenting upon the finding of wagering intent by the Circuit Judge, said (Rec., p. 448):

> "In our opinion this conclusion is not supported or warranted by the facts in the case, that is, the agreed statement of facts, the affidavits and depositions—the only facts before the trial judge and necessarily the only evidence upon which he could predicate a decision.

> "The purpose of the insurance was to protect the interests of Benson, Smith & Company, Limited, against a sudden demand for funds in the event of the death of any of the three men, they virtually owning the entire business; that also was Rumsey's understanding of the matter, and he regarded it as a perfectly legitimate business transaction and not that he was participating in a gambling scheme—nor was the contract in contravention of the rule of public policy against wager policies."

Benson, Smith & Company had an insurable interest in the life of Rumsey, as one of its principal officers and stockholders; the purpose of the insurance was bona fide, and Benson, Smith & Company, is accordingly entitled to the proceeds of the insurance.

As the question of insurable interest is the leading one in the present case, it has been deemed necessary to discuss it at length, for once the insurable interest has been established in Benson, Smith & Company, Limited, no further question of its right to the proceeds of the policy can arise. The element of wager is entirely negatived by the insurable interest in the corporation, and, under either theory of the case, Rumsey had no right to change the beneficiary under the policy.

THE QUESTION OF INSURABLE INTEREST IS ONE THAT IS PROPERLY RAISED ONLY BY THE INSURANCE COMPANY.

Vance on Insurance, 141;

2 May on Insurance, 399e.

> "A policy of life insurance for the benefit of one not a relative is not against public policy, and *if*

it were no one but the insured could raise the question.''

19 Am. & Eng. Ency. of Law, 105.

"Where a policy is taken out by one person on the life of another, the want of insurable interest may be set up by the *insurer* as a defense to an action on the policy."

Keckley v. Coshocton Glass Co., 86 Ohio St. 213; 99 N. E. 299, 301.

"And, further, it thus distinctly appearing that the company had a direct pecuniary interest in the life and personal services of Gainor, the insurance for the benefit of the company was based on an insurable interest and was valid; and whether such insurable interest continued until the maturity of the policies, or ceased before the maturity of the policy in the one case, or ceased before the written assignment in the other case, is not material; *for it has been held that the want of insurable interest is available only to the insurer* (Chicago Title & Trust Co. v. Haxtun, 129 Ill. App. 626; Langford v. Freeman, 60 Ind. 55); and, if that is too broad a statement of the law, there is abundant authority for holding that when the insurer has recognized the validity of the policy by paying the amount of the policy to the beneficiary, or into court, other parties claiming an interest in the fund cannot object on the ground that the beneficiary named in the policy had no insurable interest. Langford v. Freeman, supra; Standard Life & Accident Ins. Co. v. Catlin, 106 Mich, 138, 63 N. W. 897; Mechanics' National Bank v. Comins, 72 N. H. 12, 55 Atl. 191, 101 Am. St. Rep. 650; Hosmer v. Welch, 107 Mich. 470, 65 N. W. 280, 67 N. W. 504; Diffenbach & Roemer v. New York Life Ins. Co., 61 Md. 370; Groff v. Mutual Life Ins. Co., 92 Ill. App. 207; Johnson v. Van Epps, 110 Ill. 551; Grigsby v. Rus-

sell, 222 U. S. 149, Per Holmes, J., page 155, 32 Sup. Ct. 58, 56 L. Ed. 133, 36 L. R. A. (N. S.) 642. And see, also, Lewis v. Phoenix Mut. Life Ins. Co., 39 Conn. 100; Hurd v. Doty, 86 Wis. 1, 56 N. W. 371, 21 L. R. A. 746. In the cases at bar, the insurer has waived any defense, and has paid the money into court."

1 Page on Contracts, 601.

"At any rate the assignor and all claiming under him cannot object that the assignee has no insurable interest. This view has been expressed in cases where the contract was a mere wager so far as the assignee was concerned. *Such defense can be interposed only by the insurer.*"

V.

THE RESERVED RIGHT TO CHANGE THE BENEFICIARY NAMED IN THE POLICY.

A. Lack of power to exercise it under the facts of this case.

It has already been shown that whichever view is taken of the position of the parties concerning the insurance policy, no right existed in Rumsey to change the designated beneficiary. To repeat, if Rumsey took out the policy on his own life, naming the Drug Company as the beneficiary therein, and assigned it to Benson, Smith & Company, Limited, pursuant to the terms of the oral contract above referred to, he had no right to break that agreement. If, on the other hand the policy was procured by Benson, Smith & Company, upon the life of Rumsey, the corporation having an insurable interest therein, the policy belonged to it absolutely and Rumsey could have no power whatever over it.

Appellant contends (Appellant's Brief, p. 9 "I"), that "the change of beneficiary clause of the insurance policy *reserved to the insured* absolutely the right to substitute his wife as beneficiary instead of the Drug Company".

Assuming Rumsey to have been the original owner of the insurance, it has already been pointed out that he lost any rights he may have had therein by the transfer to the Drug Company. He delivered the policy to the Drug Company, or permitted it to be so delivered by the insurance company, with the intention of vesting title in that concern. On the theory, then, that he originally owned the policy and had the right to change the beneficiary, he vested that right in the Drug Company by his oral assignment of the policy to it, accompanied by a delivery of the policy itself.

On the other possible theory, that the Drug Company itself took out the insurance, that is, was initially and remained thereafter continuously the owner of the policy, Rumsey had no right of any kind in the insurance at any time. He owned nothing which he could assign. Whatever rights existed in or about the policy were the property of the Drug Company.

Appellant's whole claim is based upon the technicality concerning the wording of the policy. It definitely appears from the record that Rumsey, under whom appellant claims, was not the owner of the policy and had no rights in it. It was never the intention of Rumsey or the Drug Company that he should benefit by the issuance of the policy. As shown by the acts, statements and testimony of the parties in interest, the intention

was that the Drug Company should pay for the insurance and should be the owner of it. Rumsey did not pay for the insurance and hence did not own it. Mrs. Rumsey's rights are no greater than his.

"The direct evidence contained in the stipulation of facts and the surrounding circumstances disclosed thereby shows conclusively" that Rumsey intended at the time the insurance was applied for and written, and that Rumsey did by the assignment, make Benson, Smith & Company, Limited, the absolute beneficiary under the policy; that he relinquished any and all rights which he might otherwise have had therein.

B. The new offer—its non-acceptance.

It is true that Mr. Smith stated in his letter of January 22, 1907 to Rumsey (Rec., p. 140), that the policy could be assigned to him (Rumsey) by the *firm,* after the payment for all of his stock had been made and on the repayment to the firm of the amounts expended for annual premiums. No action had as yet been taken *"by the firm",* but if this be considered an offer to reassign the policy to Rumsey on very definite terms, such an offer was never accepted by Rumsey.

Rumsey, replying under date of March 29, 1907 (Rec., p. 143), said:

> "Yours of 1/22 you mention ins policy & its assignment an payment of all premiums—My stock interests carries a limited benefit pro rata in all the policies issued for the benefit of the firm likewise limited pro rata liabilities as to premiums *it looks to me as if a payment of my share in those pre-*

miums according to my holdings & not the full amt would be equity in the premises.

"In taking over the policy, I should prefer to do so at the June payment."

This was not an acceptance of Smith's offer in any sense of the term, but a new offer on entirely new terms upon which Rumsey would take over the policy. Not having accepted the terms proposed, Mr. Smith wrote him April 11, 1907 (Rec., p. 144):

"We will therefore consider this matter as closed."

Assuming that the offer was renewed by Smith in his letter of September 25, 1907, when he said:

"Reference to my letter of the 22nd of January '07 will show you that I suggested that you take over the policy *after all your stock had been retired, and on the repayment to the corporation of the amounts expended for premiums. This suggestion remains in force;*"

there is nothing in the record to show that Rumsey ever accepted the terms of the offer.

Letter of Smith to Rumsey May 16, 1908 (Rec., p. 172):

"Insurance Policy. This subject was fully covered in my letter of Sept. 25th, 1907. The opinion therein given was, again, not my own but came from the attorneys above referred to and from the insurance department of Bishop & Co. I would render myself liable to indictment were I to turn over to you an asset of this nature *without receiving the compensation asked for in my advices on the subject.*"

The offer never having been accepted, the original position of the parties continued until Rumsey's death, at which time his stock had not all been retired.

That Smith made a new offer to Rumsey, offering to allow him to change the beneficiary on definite terms, does not, as appellant contends (Appellant's Brief, p. 25), show that "Smith at first conceded Rumsey's right to change the beneficiary". An acceptance of the offer would have conferred upon Rumsey a new right, which he did not then possess. His non-acceptance denied him that right. Appellant states (Appellant's Brief, p. 25):

> "The only difference between Smith and Rumsey was whether Rumsey should reimburse the Drug Company for all the premiums that had been paid or only for a portion or proportion based upon some equitable consideration with respect to the stock holdings of the different parties."

In other words, appellant thereby admits that there was no acceptance of Smith's terms, but an offer of different terms. It is stated (Appellant's Brief, p. 26), that:

> "If Rumsey did not have the right to change the beneficiary by the original contract he obtained that right by this latter contract."

That there was no "latter contract" has just been shown, and Rumsey did not have the right to change the beneficiary by the original agreement.

C. The attempt to change the beneficiary.

In spite of the assignment of the policy to Benson, Smith & Company, Limited, pursuant to the terms of the oral agreement, after his marriage, Rumsey at-

tempted to change the beneficiary under the policy by substituting the appellant for Benson, Smith & Company, Limited, notice of which change was sent to this appellee (Rec., p. 261). It is admitted, however, that the policy of insurance did not accompany the request to change the beneficiary, nor was it ever forwarded to this appellee, and it is also admitted that there never was a complete change of beneficiary in accordance with the terms of the policy; that is, no change of beneficiary was ever at any time endorsed upon the policy so issued (Rec., p. 255).

Every presumption is in favor of the correctness of the instrument, and this appellee should be protected by the terms of the contract itself, which provides (Rec., p. 42):

> "Register of Change of Beneficiary, Note.—No Notice of Change of Beneficiary or declaration of the Absolute Beneficiary shall take effect until endorsed on this Policy by the Company at the Home Office."

As stated in

> *Anderson v. Broad Street National Bank* (N. J. 1918), 105 Atl. 599, 601:
>
> "The power to change the beneficiary is the power to appoint. The power of appointment must be exercised in the manner agreed upon in the contract of insurance."

Where a policy provides that a change of beneficiary shall be made by endorsement in writing, and that it shall not take effect until endorsed on the policy at the home office, no act of the insured can effect such a change in the absence of such endorsement.

(Rec., p. 316, Statement of the Supreme Court of the State of Colorado):

> "An insurance policy, like any other written instrument, is to be considered as a whole. The parts concerning the change of beneficiary must be likewise thus considered. *That portion which provides that no change shall take effect until indorsed on the policy by the company at the home office is entitled to the same consideration as any other portion pertaining to such change. It stands admitted that no change of beneficiary was ever indorsed on this policy by the company at the home office, or elsewhere, and that it was never presented to the company at its home office, or elsewhere, for this purpose.* It therefore follows that there had not been a change of beneficiary perfected and fully completed in the manner provided by the policy."

The maxim that "Equity regards as done that which should have been done" is not applicable in the present case. To hold that Benson, Smith & Company, Limited, should have surrendered the policy in order that the change of beneficiary might have been effected thereon, and that because it so refused to surrender the policy equity will regard the change of beneficiary as having been completed, would be

> "to hold that the policy had been wrongfully withheld from the insured by Benson, Smith & Company, Limited, and for that reason the substitution should be treated as complete" (Rec., p. 45).

This would include a finding in equity that Benson, Smith & Company, Limited, had ceased to be the beneficiary and, it has already been shown that as Benson, Smith & Company, Limited, had an insurable interest at the time the policy was procured, such in-

terest did not cease when Rumsey severed his connection with the corporation, nor thereafter, as far as the policy in question is concerned.

D. Non-waiver of terms of the contract by this appellee.

Nor was there any waiver by this appellee with respect to the endorsement of the change of beneficiary on the policy as contended by appellant (Appellant's Brief, p. 10). That it at all times insisted upon compliance with the terms of the policy as to the manner in which the beneficiary might be changed appears in the record (Record, pp. 263-267). As stated by the Supreme Court of Colorado in the case of *Emma F. Rumsey v. New York Life Insurance Company et al.*, (Rec., p. 44).

> "The evidence concerning the change of beneficiary and the alleged waiver by the company consists of the written instrument calling for the change and certain correspondence between counsel for the plaintiff, who was also counsel for the insured and the insurance company. This correspondence extended over a period of about three years. It would accomplish no good purpose to insert it in an opinion. A careful study of it leads to no other conclusion than that *it fails to disclose any waiver by the company, but to the contrary it discloses that the company, at all times, insisted that this requirement be complied with.*"

On May 6, 1910, the Rumseys, through their attorneys, O'Donnell & Graham (Rec., p. 274), notified this appellee that they desired to make tender of the annual premium which was due June 11, 1910, one month before Rumsey's death. The payment of said premium was made to the agent of this appellee at Denver,

Colorado, by the said attorneys, and received by said agent conditionally (Rec., p. 269).

> "Received from T. J. O'Donnell $232.30 for his accommodation and at his request, with the understanding that I am to forward it for him to the Home Office of the New York Life Insurance Company, where the record is kept of Policy No. 3442989; that neither I nor the office of said Company with which I am connected, have any record or knowledge of said policy, or authority to collect a premium upon it, or otherwise to take any action of any kind about it.
>
> Executed in duplicate at Denver, Colo. this 11th day of June, 1910.
>
> A. R. Fleming.
>
> That the said T. J. O'Donnell as the attorney for the said petitioner, Emma Forsyth Rumsey, consented to the terms and conditions of such receipt and endorsed upon said receipt the following:
>
> "The terms of the above receipt assented to
>
> T. J. O'Donnell."

The annual premium had already been paid by Benson, Smith & Company, which corporation had also paid all previous premiums. Upon ascertaining that the premium was already paid, this appellee tendered the money back, and appellant refused to accept it. This money was finally paid into court with interest for the use and benefit of appellant in an action instituted by her against this appellee in the District Court of the City and County of Denver, Colorado (Rec., pp. 268-272).

The mention of certain dates is pertinent at this point in view of appellant's statement (Appellant's Brief, p. 31), "that this premium was retained by the insurance

company until after commencement of the suit in Colorado already alluded to".

The premium in question, as stated *supra,* was received by the agent of the company on June 11, 1910; Rumsey died on July 27, 1910, and the Colorado suit was begun on August 15, 1910. In view of the proximity of these dates, it is submitted that this appellee did not delay an unreasonable length of time in tendering repayment of the money, and that no rights accrued to appellant by the conditional acceptance of the premium by this appellee, nor did this appellee thereby waive the condition with respect to endorsement of the change of beneficiary on the policy, which, as stated by appellant (Appellant's Brief, p. 10), "was reserved for the benefit of the insurance company".

This appellee should therefore be protected by the terms of the contract which required such an endorsement upon the policy itself. In view of the fact that this appellee paid the proceeds of the policy to the designated beneficiary therein, namely, to Benson, Smith & Company, Limited, in accordance with the judgment therefor obtained against it in the Circuit Court of Hawaii, such payment should constitute a complete defense to this action.

19 Am. & Eng. Ency. of Law, 106.

> "Payment to the person legally entitled to the proceeds of the policy as to an assignee under a valid assignment, is a good defense to an action on the policy."

The language in

Royal Union Mutual Life Ins. Co. v. Lloyd (1918), 254 Fed. 407, 410,

shows that where no change of beneficiary is endorsed upon the policy, the insurance company is protected by its payment to the original beneficiary designated therein.

> "The provision for a return to the company of the original policy, so that an indorsement of change of beneficiary may be made thereon, *is one for the protection of the company.*"

In reference to similar requirements, the United States Supreme Court, speaking through Mr. Justice Brandeis, said in

Supreme Council of the Royal Arcanum v. Behrend, 294 U. S. 394; 62 L. Ed. 1182, at 1186:

> "Furthermore, *requirements of that character are made for the protection of the Society* and, if complied with to its satisfaction, or if waived by it during the lifetime of the insured, cannot be availed of to support the claim of a former beneficiary."

As the provision that no change of beneficiary could become effective without the production of the policy, so that the change might be endorsed upon it, was not complied with, and as the record shows that the insurance company insisted upon and did not waive this requirement, and as the requirement is held to be for the protection of the company, appellant cannot be now heard to say that the requirement has been waived by the company or is without force. Whatever rights Rumsey may have had

with relation to this policy, those rights are governed by the terms of the policy, including this requirement as to a method of change of beneficiary. The fact that the policy was not produced at the time the attempt to change the beneficiary was made constitutes in itself a complete defense to this suit on the part of the insurance company.

If Benson, Smith & Company, Limited, had an insurable interest in Rumsey's life, it became the owner of the insurance policy in suit either on the theory that the policy was originally taken out by Rumsey and by him assigned to the Drug Company, or on the theory that the Drug Company itself directly took out the policy and thereafter remained the owner thereof. On either theory, Rumsey had no interest in the policy at the time of the attempted change of beneficiary and therefore he could not have effected such a change. Moreover, even had Rumsey been the owner of the policy, in the absence of special circumstances, he could not have effected a change of beneficiary which would have been valid as against the insurance company without producing the policy so that the change of beneficiary might have been endorsed thereon.

VI.

LACHES.

By her laches, appellant lost her right to have the policy reformed by inserting her name therein as bene-

ficiary, assuming that such right ever existed. It is thoroughly established that such a right may be lost by laches.

5 Joyce on Insurance, 5856.

"A policy may be reformed after loss as well as before *if the insured has not been guilty of laches.*"

An action on the contract is governed by the law of the forum.

25 Cyc. 1018.

In this case, then, the law of Hawaii, and not that of New York, controls on the question of laches and limitation of action, though the contract itself was by its terms to be performed in the State of New York.

The statute of limitations in such a case as the present one is four years, according to

Section 2638 of the Revised Laws of Hawaii, 1915:

"Sec. 2638. Four years. The following actions shall be commenced within four years after the cause of action accrued and not after. Actions for the recovery of any debt founded upon any contract, obligation or liability, where the cause of action has arisen in any foreign country, except such as are brought upon the judgment or decree of a court of record."

Rumsey died July 27, 1910, and it was not until 1916 that appellant filed her bill of complaint in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii.

Such is the statutory period applicable in the instant case, but laches in legal significance is not mere lapse

of time, whether greater or less than the precise time of a statute of limitations. It is delay for such time as makes the doing of equity either impossible or doubtful.

5 Pomeroy Eq. Jur., 39.

"'Laches, in legal significance, is not mere delay, but delay that works a disadvantage to another. So long as parties are in the same condition, it matters little whether one presses a right promptly or slowly, within limits allowed by law; but when, knowing his rights, he takes no step to enforce them until the condition of the other party has, in good faith, become so changed that he cannot be restored to his former state, if the right be then enforced, delay becomes inequitable, and operates as estoppel against the assertion of the right. The disadvantage may come from loss of evidence, change of title, intervention of equities, and other causes; but *when a court sees negligence on one side and injury therefrom on the other it is a ground for denial of relief.*'"

Galliher v. Cadwell, 145 U. S. 368; 36 L. Ed. 738, 740.

"Laches is not like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties." * * *

The cases in which this defense has been invoked and considered "proceed on the assumption that the party to whom laches is imputed has knowledge of his rights, and an ample opportunity to establish them in the proper forum; that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless, or have been abandoned; and *that because of the change in condition or relations during this period of delay, it*

would be an injustice to the latter to permit him to now assert them.''

Penn Mutual Life Ins. Co. v. Austin, 168 U. S. 685; 42 L. Ed. 626, 631:

''The reason upon which the rule is based is not alone the lapse of time during which the neglect to enforce the right has existed, but the changes of condition which have arisen during the period in which there has been neglect. *In other words, where a court of equity finds that the position of the parties has so changed that equitable relief cannot be afforded without doing injustice, or that the intervening rights of third parties may be destroyed or seriously impaired, it will not exert its equitable powers in order to save one from the consequences of his own neglect.''*

Northern Pacific Ry. Co. v. Boyd, 228 U. S. 482; 57 L. Ed. 931, 944;

Pond Creek Coal Co. v. Hatfield, 239 Fed. 622;

O'Brien v. Wheelock, 184 U. S. 450; 46 L. Ed. 636.

From the very nature of the doctrine of laches, each case must turn upon its peculiar facts. In the instant case appellant's cause of action, if any, against this appellee arose in August, 1910, when proof of the death of Samuel L. Rumsey was submitted and a claim made for the proceeds of the policy. The appellee allowed more than four years to elapse after that date before bringing the present proceeding. In the meantime suit was brought against this appellee in the Circuit Court of Hawaii by Benson, Smith & Company, Limited, as beneficiary under the policy for the proceeds thereof. Judgment was rendered in its favor and this appellee

was compelled by said court to pay and did pay the proceeds of the policy to the said corporation. In other words, the position of the parties had changed by the time the present suit was commenced, so that relief cannot now be afforded without doing injustice. Laches is prejudicial delay.

In the case at bar, long after appellant's rights had arisen, and after she knew that the insurance company would not pay her on account of the claims of Benson, Smith & Company, Limited, so that she had full opportunity to commence a suit in Hawaii, an action was there brought by Benson, Smith & Company, Limited, and recovery had in its favor. Under the compulsion of that judgment, and not as a voluntary act, this appellee was compelled to pay Benson, Smith & Company, Limited, the proceeds of the policy. This change in position was brought about solely by appellant's failure to bring a timely proceeding in the courts of Hawaii. By her failure so to do, which has resulted in the prejudice to the insurance company, appellant has lost her right, if any such ever existed, to have the policy reformed. The purpose of the doctrine of laches is to prevent the enforcement of stale demands of all kinds. Wholly independent of any statutory periods of limitations, it is and should be a bar to such relief as is sought in the present case.

SUMMARY.

The uncontroverted evidence shows that the three principal stockholders and officers of the Drug Com-

pany agreed to insure their respective lives in its favor and at its expense, and pursuant thereto the policies were taken out by them with the New York Life Insurance Company and the premiums were paid by the Drug Company. The policies were delivered to the Drug Company and consistently held by it. The policy in suit contained provisions for the change of beneficiary provided the instrument itself were delivered up to the insurance company so that a suitable endorsement of such change could be made. Rumsey attempted to change the beneficiary, but did not produce the policy to the insurance company because it was held by the Drug Company under claim of right. The legal results flowing from these facts are:

(1) No question of insurable interest is involved, as Rumsey took out the policy on his own life. Any individual may legally insure his own life in favor of whom he will. Neither a beneficiary nor an assignee need have an insurable interest.

(2) If it be considered, however, that Benson, Smith & Company, Limited, originally took out the insurance, or could not be the beneficiary or assignee without having an insurable interest in Rumsey's life, nevertheless such an interest existed for the reason that a business corporation has an insurable interest in the life of one of its principal officers and stockholders.

(3) If the policy was valid in its inception, so that the Drug Company had at any time the right to recover thereon, that right was not lost because Rumsey later severed his business connection with the corporation.

(4) The question of insurable interest is properly raised only by the insurance company, so that if that question were here involved it could not be raised by one claiming to be a beneficiary of the policy.

(5) If the policy was taken out by Benson, Smith & Company, Limited, and is to be considered a wagering contract, as appellant contends, neither appellant nor anyone else can recover on it. Such a policy would be void in its inception because of the illegality of wagering contracts.

(6) Rumsey had no right to change the beneficiary named in the policy because he had assigned it to the Drug Company, which paid all of the premiums and was completely vested with title. If it be held that the Drug Company originally took out the insurance, Rumsey then was not a party at all to the contract, it was not made for his benefit and he had no rights of any character except as a stockholder in the corporation.

(7) The provision of the policy requiring its production in case of a change of beneficiary, so that same might be endorsed thereon, is inserted for the protection of the insurance company and has not been waived in any way. Rumsey did not and could not produce the policy, because he had intentionally caused it to be in the possession of the Drug Company; hence appellant, claiming under Rumsey, cannot insist upon the effectiveness of the attempted change.

(8) Appellant's right to reform the policy in equity, if such ever existed, is barred by her laches, for long after the policy became payable through Rumsey's

death, the Drug Company secured a judgment in Hawaii against the insurance company and compelled the payment of the proceeds of the policy to it, so that without its fault the position of the insurance company has been changed to its prejudice. Prompt action on appellant's part would have avoided this prejudicial situation.

For these reasons, the decision of the Supreme Court of Hawaii should be sustained.

Dated, San Francisco,
May 10, 1920.

Respectfully submitted,

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No. 3444.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

EMMA F. RUMSEY,

Appellant,

vs.

NEW YORK LIFE INSURANCE COMPANY, AND BENSON, SMITH & COMPANY, LIMITED,

Appellees.

BRIEF AND ARGUMENT FOR APPELLANT.

UPON APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

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United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

EMMA F. RUMSEY,
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NEW YORK LIFE INSURANCE COMPANY, and BENSON, SMITH & COMPANY, LIMITED,
Appellees.

BRIEF AND ARGUMENT FOR APPELLANT.

Statement of the Case.

This is an appeal from a judgment of the Supreme Court of the Territory of Hawaii reversing a judgment, in equity, of the Circuit Court of the First Judicial Circuit of the Territory of Hawaii (Honorable C. W. Ashford, Judge) in favor of appellant.

The action was brought by the appellant to recover the proceeds of a policy of life insurance on the life of her husband.

The corporate character and business of the appellee, the New York Life Insurance Company of New York, is so well known that it is unnecessary to state it. The

Appellee, Benson, Smith & Co., Ltd., a Hawaiian corporation, is, and at the time of all the occurrences involved in this controversy was, engaged in the drug business at Honolulu. We shall hereinafter refer to the respondents, respectively, as the Insurance Company and the Drug Company.

The controversy is over the proceeds of a policy of insurance issued by the Insurance Company on the life of appellant's husband.

The husband, Samuel L. Rumsey, formerly a resident of Honolulu, died on the 27th day of July, 1910.

The Insurance Company admits that the policy was in force at the time of the death of the insured—the only question is whether the widow or the Drug Company is entitled to the proceeds.

The Drug Company is, and at all the times in the bill mentioned was, incorporated for the purposes only of "buying, selling, dealing in and manufacturing drugs, "medicines and other commodities pertaining to said "line of business."

The policy on the life of the husband, Samuel L. Rumsey, bears date June 11th, 1903. It was applied for at Honolulu and was delivered on or about July 22nd, 1903, to George W. Smith of the Drug Company.

The Drug Company under the name and style of "the firm of Benson, Smith & Co., Ltd." is named as beneficiary, subject, however, to the following reservation:

> "CHANGE OF BENEFICIARY. The insured, having reserved the right, may change the beneficiary or beneficiaries at any time during the continuance of this policy by written notice to

> the Company at the home office, providing this policy is not then assigned * * * no * * * change of beneficiary * * * shall take effect until endorsed on this policy by the Company at the home office".

The health of appellant's husband became impaired shortly after the date of the issuance of the policy, and because of this he was compelled to and did cease active connection with the business of the Drug Company. In January following (1904), Mr. Rumsey left Hawaii and he was never again actively connected with the Drug Company or its business. He never returned to Hawaii.

The case was tried on an agreed statement of facts, from which it appears:

On the eleventh of June, 1903, one, George W. Smith, and one, Alexis J. Gignoux, together with the appellant's deceased husband, Samuel L. Rumsey, were officers, directors and stockholders of the Drug Company, Smith being the President, Rumsey the Treasurer and Gignoux the Secretary thereof. The total capital stock of the Company was five hundred (500) shares of the par value of one hundred dollars ($100) each, held as follows:

> George W. Smith, 363 shares or $36,500
> Samuel L. Rumsey, 100 shares or $10,000
> Alexis J. Gignoux, 30 shares or $3,000

and seven (7) shares divided between several other employees of the Company.

On the day last named one Purdy was a special agent of the Insurance Company, authorized only to

solicit applications for insurance in the Territory of Hawaii, under certain designated conditions and compensated for his services by a commission on the first premiums on policies, the applications for which were solicited by him. Smith was not only the largest stockholder of the Drug Company, but absolutely dominated the same. At the solicitation of Purdy, Smith determined to insure his own life in favor of the Drug Company, in the sum of five thousand dollars ($5,000), and *to require both Rumsey and Gignoux* to make an application for a policy each for $5,000 in favor of the corporation. Applications were made accordingly, and policies later issued, and the policy on which this suit is based thus passed into the possession of the corporation.

Rumsey drew a salary from the Drug Company, while engaged in its service, of Two hundred and fifty dollars ($250) per month. This salary was continued until October, 1904. He resigned as Treasurer in February, 1905.

The appellant and the insured married at Denver, Colorado, in August, 1905. Shortly thereafter, Rumsey gave notice to the Drug Company of his intention to substitute his wife as beneficiary in the insurance policy. The record does not disclose that any objection was made to such change at that time. In 1907, Rumsey agreed with Smith, who, as already stated, controlled the Drug Company, to sell his stock to the Company. During the course of the correspondence on this subject, Smith himself suggested to Rumsey, the terms on which his wife should be substituted as beneficiary and stated that three annual premiums of Two hun-

dred, thirty-two dollars and thirty cents ($232.30) each, had been paid by the Drug Company up to that time. This would amount to Six hundred ninety-six dollars and ninety cents ($696.90). Smith desired to hold the policy until "after the payments for all of" Rumsey's stock had been made. There was a long discussion by correspondence, Rumsey being in the States, and Smith in Honolulu, as to whether Rumsey should pay the *full* amount of the premiums, or whether *fairness and equity* required that the Drug Company should stand a part of the premiums, on the theory that it had had some benefit from the insurance while it was beneficiary. Smith, exercising the dominance which, the record shows, he observed toward Rumsey throughout the period covered by the facts stipulated, settled this difference on his own original terms and the matter stood thus when the Drug Company failed to complete the purchase of Rumsey's stock. Smith completed the purchase of one-half of the stock of Rumsey, for the Drug Company, but failed to carry out the agreement to purchase the remainder and disagreements and disputes arose between Smith and Rumsey.

When Rumsey finally demanded that the insurance policy be turned over to him on payment of the premiums, Smith, for the Drug Company, refused to comply.

On the 10th of July, 1907, Mr. Rumsey changed the beneficiary, on a form furnished for that purpose by the Company, and named his wife as beneficiary, and sent the change to the Home Office of the Company in New York. In this connection, the Insurance Com-

pany was notified of all the facts, as hereinbefore and hereinafter stated, with reference to the circumstances under which the policy was applied for, the change in the situation of the parties, and was further notified that Mr. Rumsey would pay all future premiums on the policy, as they became due. The Insurance Company placed the change of beneficiary on file, but notified Mr. Rumsey that the Insurance Company considered that the change would not take effect until the policy was returned to the Home Office for endorsement of the change thereon. Mr. Rumsey notified the Insurance Company that he was endeavoring to get the policy from the Drug Company, that the same was held by the Drug Company against his right, that he would produce the policy for endorsement if he could, and persisted in an effort to induce the Drug Company to surrender the policy for endorsement, offering, as before, to reimburse the Drug Company for the premiums, which it had paid and interest thereon.

On June 11, 1910, the Insurance Company accepted the annual premium due that day, from the appellant. This premium was retained by the Insurance Company until after proofs of death had been furnished, and a suit brought on the policy by the appellant in a court of general jurisdiction, at Denver, Colorado.

After the death of the insured, his widow, the appellant, obtained blanks from the Company for proof of death, had proofs made in accordance with the formula of the Company, and the same were delivered to the Insurance Company in August, 1910.

The Insurance Company declined to pay, on the

ground that the Drug Company had the policy, and claimed the proceeds. The appellant thereupon instituted suit in a court of original, general and unlimited jurisdiction in Colorado. The Insurance Company set up, as a defense, the claim of the Drug Company to the proceeds of the policy, and that the Drug Company had the physical possession of the policy and that the endorsement of the change of beneficiary had never been made thereon. The trial court sustained the position of the Insurance Company that the plaintiff could not recover without the presence of the Drug Company. This decision was affirmed by the Supreme Court of Colorado, which held

> "that the presence of Benson, Smith & Co. is essential to the protection of the Insurance Company".

The Insurance Company urged the Drug Company to come into the Colorado Court, and become a party to the action there, but the Drug Company declined to do this. Immediately following the decision of the Colorado Supreme Court, the appellant instituted the present action. It then developed that in August, 1912, the Drug Company had instituted a suit against the Insurance Company in the Circuit Court of the First Judicial Circuit, Territory of Hawaii, on the insurance policy, taking and claiming the benefit of the proofs of death furnished by the appellant; that the Insurance Company, while it filed an answer, made no defense to the action; and that judgment was entered in favor of the Drug Company, which was satisfied on the 28th of

February, 1913. The appellant was never notified of this suit, nor of the judgment, and knew nothing about either until after her present action was commenced. The trial judge found that the suit was collusive.

Article XIX of the Stipulation of Facts provides:

XIX.

> "That upon the trial * * * each of the said parties shall have the right to object to any portion of the foregoing stipulation of facts upon the ground of immateriality or irrelevancy and to introduce evidence contradictory thereto or explanatory thereof, and that the Court in deciding said cause may consider this stipulation, and all other testimony, depositions or documents offered by either party in said cause and received in evidence by the Court, and that in the event of any conflict between any statement contained in the foregoing stipulation and any deposition, document or evidence in said stipulation or between any such statement and any other deposition, document or evidence offered by either party upon the trial of said cause and received in evidence by the Court, the Court may, if it sees fit, disregard any such statement and consider in lieu thereof such other deposition, document or evidence, reserving to the said parties and each of them all rights of objection and exception" (Tr. 403).

Questions Involved.

The appellant contends:

I.

That the change of beneficiary clause of the insurance policy, reserved to the insured, absolutely, the right to substitute his wife, as beneficiary, instead of the Drug Company, on such terms, with respect to reimbursement of the Drug Company for premiums advanced, as might be equitable and just, and this right was never waived, disposed of or otherwise lost.

II.

That the direct evidence, contained in the Stipulation of Facts, and the surrounding circumstances disclosed thereby, show conclusively that it was intended, at the time the insurance was applied for and written, that the right to change the beneficiary, under such circumstances as existed when the insured undertook to exercise the right of change, should be reserved by the insured and that subsequent acts of the parties show such understanding.

III.

That the insured having done all he could to exercise the right reserved to him, to change the beneficiary, and his failure to present the policy at the Home Office of the Insurance Company, for endorsement of the change, having been caused by the wrongful act of the Drug Company, the latter Company can have no advantage from its own wrong and equity will disregard this requirement, if necessary, in order to do equity.

IV.

That the condition, with respect to endorsement of the change of beneficiary on the policy, was reserved for the benefit of the Insurance Company; it was in its nature a condition subsequent; it might be waived by the Insurance Company, and it was waived by the acceptance of the premium, paid by the appellant and her husband, June 11th, 1910.

V.

That the policy in question was procured by the Drug Company as part of a scheme, effort and plan to insure the lives of divers stockholders of the Drug Company for the benefit of the Corporation; that this was an illegal transaction, and that the Drug Company cannot take the funds arising from such a transaction as against the appellant, who is morally, equitably and legally entitled to these proceeds.

That the Stipulation of Facts shows the taking out of this policy, by the Drug Company, on the life of the insured, to have been part of a gambling transaction, by the Drug Company, on the lives of its stockholders.

VI.

That even if the holding of the nominal office of Treasurer of the corporation by the insured, at the time the policy was applied for and written, created such a relation between the Drug Company and the insured, as authorized the Drug Company to insure the life of deceased for its benefit or to "require" that

insured should take out a policy on his life for the benefit of, and at the expense of, the corporation, nevertheless, such relationship having terminated, long before the change of beneficiary was made by the insured, the supposed insurable interest had terminated, and although the reservation in the policy, by the insured, of the right to change the beneficiary might have been *suspended* during the time the insurable interest of the Drug Company existed, the reservation came into effect, *ex proprio vigore,* immediately upon the cessation of the relation which created the insurable interest.

Brief and Argument.

We do not, by the order in which we have stated the appellant's contentions, intend to indicate that we regard any one of them as more persuasive, important or conclusive than the other.

We do insist, however, that the record demonstrates so conclusively the right of the insured to change the beneficiary, at the time he made the change and registered it with the Insurance Company, that when the Court has examined this phase of the case, it will find it unnecessary to go into the questions of insurable interest, gambling in life insurance policies, and the like, and the Court can save itself much labor by taking up the questions involved substantially in the order in which we have presented them above and determining only so many of them as may be necessary to a determination of the rights of the appellant.

I-II.

We will discuss propositions I and II together.

I.

Assuming, for the purposes of argument, the transaction, of which the taking out of the insurance policy was a part, to have been perfectly legal in all respects, and assuming that Mr. Rumsey acted as a *free agent* in becoming a party to the transaction and "doing his bit", which was to sign the application and, supposedly, submit to a physical examination—assuming this although the facts set out in the Stipulation make it plain that the "retirement" of Mr. Rumsey, from the service of the Drug Company, would have been the penalty for refusing to comply with what was "required", then the contract under which the policy was applied for and issued, was a tripartite contract between the Drug Company, Rumsey and the Insurance Company; and the terms of the policy are a part of that contract; hence the *reservation,* by the insured, *of the right to change the beneficiary* was a part of the contract, and *constituted a vested right in the policy.* The condition to the taking effect of that right when exercised, that the change must be endorsed on the policy, at the Home Office, before becoming effective, taken in connection with the physical possession of the policy by the Drug Company, must be construed as having been intended for the protection of such rights as the Drug Company might have in the policy at the time the transfer, or the change of beneficiary was attempted.

Following the well-known rule of construction, that effect must be given to all parts of the contract, this is the only interpretation possible. The construction put upon the contract by the Drug Company, *destroys the reservation* of the right to change the beneficiary; whereas, this construction harmonizes the contract and gives effect to both provisions. The reasons for this interpretation are supported by the fact that the policy itself provides for the designation of an *"Absolute Beneficiary"*, and that it must be presumed, under all rules of construction, that the Drug Company would have been made the Absolute Beneficiary, had such been the intention of the parties.

Rumsey had a right by contract with the Drug Company to change the beneficiary.

The opinion of the Territorial Supreme Court speaks of the "result contemplated by the parties".

Waiving, for the purpose of the argument of this proposition, all question as to insurable interest and the like, let us look at the transaction as of the date of the policy.

Assuming the Drug Company's view, that it had a right to require Rumsey to allow it to insure his life for the benefit of the corporation, and that the agreement between the corporation and Rumsey, that the corporation would insure Rumsey's life for the benefit of the corporation, was perfectly legal, the contract—the actual contract—the whole contract—is not arrived at by finding out what Smith, the mouthpiece of the corporation, said to Rumsey and what Rumsey said to Smith, or by adding thereto *the mere fact* that the

policy was issued. *The policy itself is a part of the contract between the Drug Company and Rumsey,* as well as between Rumsey, the Drug Company and the Insurance Company.

The Drug Company's contention *eliminates Rumsey altogether as a party to the transaction,* for if Rumsey had no rights under that clause of the policy which relates to change of beneficiary, he was not a party to the contract at all: *instead of being a live man, he had just as well been the colored glass in the window of the Drug Company's drug-store,* the time-immemorial sign of the apothecary shop.

If Rumsey had no rights under the change of beneficiary clause, *without obtaining the possession of the policy, then he had no right at all,* because he had no power to obtain the possession of the policy. He could not get possession unless by the grace of the Drug Company, and the clause was ineffective and ineffectual if he had to depend on the grace of the Drug Company to enable him to present the policy "At the Home Office". He would have had just as much right in, and control of, the insurance had there been no change of beneficiary clause in the policy, for the Drug Company could at its pleasure, have made him a gift of the policy, or could have sold the policy to him and registered and evidenced the transaction by an assignment of the policy. The position of the Drug Company is based on the theory that some act by the Drug Company was necessary to create in or confer on the insured *any right whatsoever,* and this is exactly what would have been the case had there been no such clause in the policy.

The parties did not so act; they did not leave matters in this way. On the contrary, the policy in its very beginning, promises to pay

> "to the firm of Benson, Smith & Co., Ltd., or its legal representatives, OR TO SUCH BENEFICIARY AS MAY HAVE BEEN DULY DESIGNATED AT THE HOME OFFICE OF THE COMPANY".

And then follows the significant clause

> "Change of Beneficiary", etc.

If this stood alone, it should be sufficient, but the language which follows dissipates any doubt that might otherwise possibly exist.

> "The insured may at any time by written notice to the Company, at the Home Office, declare any beneficiary then named to be an *absolute beneficiary* under this policy".

We, therefore, have the policy written with these two provisions:

(*a*) That the insured may CHANGE the beneficiary.

(*b*) That the insured may DECLARE the beneficiary named to be an ABSOLUTE BENEFICIARY. *The Drug Company now claims that it was at all times an absolute beneficiary,* and that for that reason, the insured never had any right, to change the beneficiary.

If this were the intention of the parties, if this was the contract, why was it not so expressed? Why was plain language used which cannot by any construction of which it is capable, be harmonized with such an intent?

The result contemplated by the parties is made the basis of the decision of *Olmstead* vs. *Keyes,* 85 N. Y. 593, cited by the Territorial Supreme Court and the Territorial Supreme Court verbally accepts this supremely fair basis.

Evidently the parties to the transaction at bar contemplated:

(1) That Rumsey might want to change the beneficiary;

(2) That the Drug Company might have claims against the policy;

(3) That the Drug Company would act honestly and fairly in the matter and would surrender the policy, just as Smith at first proposed to surrender it, when the rights of the Drug Company were satisfied.

The parties acted subsequently on the theory that Rumsey had the right of change reserved to him in the policy

and

The Drug Company for a valuable consideration agreed that Rumsey might change the beneficiary on repayment of the premiums advanced by the Drug Company.

Immediately after Mr. Rumsey married appellant, the matter of changing the beneficiary came up.

It is admitted in the answer of the Drug Company that Rumsey

> "made a purported demand upon this respondent for the surrender of said policy in the year 1905, asserting that the said Samuel L. Rumsey intended to change the beneficiary under the terms of the said policy of life insurance" (Tr. 105).

Under date of January 22, 1907, Smith in a letter to Rumsey, wrote:

> "In this connection I would mention the insurance policy on your life in the New York Life Insurance Company, in favor of the firm for the sum of $5,000. The annual premium on this is $232.30. There have been three premiums paid thereon, and the next one is due in June, 1907. This policy could be assigned to you by the firm after the payments of all of your stock had been made, and on the re-payment to the firm of the amounts expended for annual premiums. That is, if you should so desire it. The policy could then be placed for the benefit of your wife" (Tr. 141).

Mr. Rumsey, replying under date of March 29, 1907, criticised the decision of Smith to charge him the full amount of the premiums paid on the policy, but acceded to the proposal by concluding his letter in these words:

> "In taking over the policy, I should prefer to do so at the June payment" (Tr. 143).

The term "June payment" referred to the payment of an instalment which became due the following June under the option the Drug Company then held to purchase Rumsey's stock.

In reply to the latter letter, Smith, under date of April 11, 1907, said that

> "the business would prefer to carry the policy as *an investment*".

He then took up the suggestion made by Rumsey that the latter should not in equity be charged the full amount of the premiums paid, and said:

> "The question of equity is one that would work both ways, and carefully figured out would amount to the payments that have been made on the policy. *We will, therefore, consider this matter closed.*" (Italics ours.)

At the time this correspondence occurred, Smith had obtained for the corporation, an option on Rumsey's stock in the corporation. Such option was exercised to the extent of purchasing $5,000 of the stock at par. The panic of 1907 interfered with the consummation of the purchase by the corporation, leaving in the hands of Rumsey, or possibly the petitioner, who had then become Rumsey's wife, and to whom Rumsey transferred his stock, $5,000 par value of the stock, which had been included in the option. The intimately friendly tone of the correspondence up to that time changes into formal letters and Smith, who had expressed in the letter first quoted from, a desire merely to retain the insurance policy until the purchase of the stock was completed, now declined to turn over the policy. Rumsey's health had grown gradually worse, as is shown by the correspondence, and Smith's determination to hang onto the policy evidently increased as the health of the insured failed, but there was not as yet, nor until Rumsey's comparatively early death became inevitable, any denial of Mr. Rumsey's rights under the policy. Under date of September 25, 1907,

Smith again wrote Rumsey concerning the insurance, undertaking in his letter

> "to review the subject from the beginning in order to revive in your memory the conditions under which insurance became a feature of the business".

He adds:

> "When in 1903 (the date is erroneous, should be 1904) I took out life insurance on my life in favor of Benson, Smith & Co., Ltd., for the sum of Five Thousand Dollars * * * I required that all the stockholders in *active service* with me should take out policies of like amount each, viz: Five thousand dollars, in favor of the corporation of Benson, Smith & Co. *This was a requirement of mine, and refusal to do so on the part of anyone would have justified me in asking for the retirement of the party refusing.* (Tr. 159.) (Italics ours.)
>
> * * * *
>
> "You state that the Corporation has no right to hold a policy on your life. In this you are mistaken. *The Corporation has a right to hold a policy on your life, on the life of the President of the United States, and the Emperor of Germany, or any other person on whom the Life Insurance Company will take a risk* * * * *This is a fact that is often made use of by speculators.* You state that you had intended taking up this matter up but I had anticipated you.
>
> "Reference to my letter of the 22d of January, '07, will show you that I suggested that you take over the policy AFTER all of your stock had

> been retired, and on the re-payment to the Corporation of the amounts expended for premiums. *This suggestion remains in force*" (Tr. 161). (Italics ours.)

Under date of May 16, 1908, referring to the question whether Rumsey should pay the whole amount of the premiums or some proportion less than the whole, Smith wrote:

> "I would render myself liable to indictment were I to turn over to you an asset of this nature *without receiving the compensation asked for in my advices on the subject*".

The relations between Smith and Rumsey grew more strained and under date of May 16, 1908, Smith, in a letter, denounced something which Rumsey had written in a previous letter, as

> "a malicious misstatement".

Considering the close relation, which Smith contended should be maintained between the stock held by Rumsey and the insurance policy, it is quite clear that Smith's statement "we will therefore consider this matter as closed" in his letter of January 22, 1907, and his statement "this suggestion remains in force" in his letter of September 25, 1907, taken in connection with his statement in those letters that the change in the policy was to be made AFTER Mr. Rumsey's "stock" had been retired and on the repayment to the corporation of the amounts expended for premiums, that such a disposition of the insurance was then considered by Smith as a concluded matter.

What Rumsey said with reference to Smith's proposition that he should reimburse the Drug Company for the *entire* amount of the premiums paid is a *criticism rather than a dissent.* The correspondence shows that it was so regarded by Smith. This is not like one of those cases where the minds of parties, attempting to make a contract by correspondence, has to meet on every identical item in order that a contract may result. The right of Rumsey to change the beneficiary of the policy was asserted, and it was considered and acknowledged and this occurred in connection with the option of the Drug Company to purchase the stock. It was not as if Rumsey had not, or did not, assert any right in the policy. If it were an original proposition for the barter and sale of an article it would be necessary, in order to make a concluded contract, that the parties should agree upon a price. Here was property which Rumsey claimed and the only question was how much he *owed* on the property, *not to purchase it, but to redeem it,* as it were.

The correspondence amounts to an agreement:

1st: That he had the right to redeem on the payment of what is equitably due; and

2nd: That the amount equitably due was the amount which the Company had paid for premiums.

The fact that the Drug Company fell down on its undertaking to purchase all the stock or failed to purchase all of it, at that time, cannot affect the rights in the insurance policy which were then conceded in connection with the right which the Drug Company

obtained to purchase the stock. *The Drug Company did purchase all the stock before it realized upon the insurance policy.*

One of the purposes variously claimed by Smith to be the purpose for which the insurance was taken, had thus been accomplished.

That Smith anticipated that the marriage of Rumsey would probably be followed by a change of the beneficiary in the insurance policy from the Drug Company to the wife is clearly shown by a letter written by Smith dated Honolulu, October 6th, 1905. The salutation is: "Dear Rumsey". A letter from Rumsey on the 19th of September is acknowledged. "The first "subject is your marriage, of which I am now first "regularly advised." Then follows in considerable space complaint that he, Smith, had not been sooner and more formally advised of Rumsey's intentions, and then the following paragraphs which can relate to nothing except the insurance policy:

> "In a matter of this kind an outsider has no right to interfere, it is each man's own privilege and his own right to judge for himself.
>
> In his relations, however, to his business associates it is customary and expected that he will give definite information. I was so advised in regard to Gignoux and would so expect to be advised by any other that I should select to be associated with me in business. When I admitted you into this business no such occurrence had arisen. In the present instance, however, I should have been fully advised. The acts injects a contingency into the business that, in view of the condition of your health and the

possibility of your inability for business or death, that will complicate matters, and I was entitled to a consultation in the matter and a statement of the anticipated time and whatever arrangements might be proposed for your estate.

Your failure to advise me has, in my opinion, been a dereliction of duty toward me.

I am now entitled to know what change, if any, you may make in the disposition of your property that is directly connected with this business."

Marriage of one of the stockholders of the Company does not ordinarily inject "a contingency into the business * * * that will complicate matters".

Even a stockholder in a corporation, as close as Smith proclaims the Drug Company to have been, has a right to enter into that still closer corporation known as wedlock. *Rumsey married,* might have performed, toward the Corporation, any duty which *Rumsey single* might have performed. At least the law, in the absence of evidence, will so presume.

Reference is made, in the portion of the letter quoted, to the condition of Mr. Rumsey's health—the insurance policy was undoubtedly in view. It must be because of the insurance policy that Smith wrote Rumsey "your failure to advise me has, in my opinion, been a dereliction of duty toward me".

"The disposition of your property that is directly connected with this business" must have included the insurance policy. If the stock which Rumsey held in the Corporation had alone been referred to, this cir-

cumlocutive phraseology used would not have been adopted. Rumsey had only *two kinds* of "property that is directly connected with this business"—

(1) *The insurance policy.*

(2) The shares of stock.

All these things show that neither Smith nor Rumsey nor the Insurance Company supposed that the rights of the parties were as they now stand adjudged by the decision of the Territorial Supreme Court.

Opinion of the Territorial Supreme Court.

With the greatest deference we submit that a consideration of this opinion discloses a very limited and narrow view of this controversy, a misunderstanding of many of the salient facts and an utter failure to consider many others. The decision is rested solely upon the question of insurable interest, although, as we have shown, it is not necessary to decide that question at all.

There is no consideration of the equities of the case in the opinion.

There is no consideration of the contract.

In the attempt, made by the Court, to state the facts in the case, coming to what occurred between Rumsey and the Drug Company, with reference to the ownership of the policy, after Rumsey had severed his connection with the Drug Company and married the appellant, this statement is made:

> "A long correspondence occurred between Rumsey and his wife and Benson, Smith &

> Company, Limited, which manifests a difference of opinion between them as to their respective rights under the policy, Benson, Smith & Company insisting upon the right to be considered the sole owner of all beneficial interest therein and the Rumseys insisting that even though such beneficial interest had formerly existed in Benson, Smith & Company, Limited, it had ceased upon the cessation of the relationship between Rumsey & Benson, Smith & Company, Limited" (Tr. 447).

The excerpt quoted is not a correct statement of the facts. It ignores the fact that Smith at first *conceded* Rumsey's right to change the beneficiary.

The only difference between Smith and Rumsey was whether Rumsey should reimburse the Drug Company for all the premiums that had been paid, or only for a portion or proportion based upon some equitable consideration with respect to the stock holdings of the different parties, and that Smith, in pursuance of the dominance which the correspondence clearly discloses he held over Rumsey, settled the matter as follows:

> "The question of the equity is one that would work (would) both ways (123) and, carefully figured out, would amount to the payments that have been made on the policy. *We will, therefore, consider this matter as closed"* (Tr. 146).

The opinion ignores the fact that in his letter of September 25th, 1907, Smith reiterated the statement contained in his letter of January 22nd, 1907, *that after Rumsey's stock had been retired, and on the repayment to the corporation of the amounts expended for*

premiums, the possession of the policy could be had by Rumsey, and added, "This suggestion remains in force".

That "suggestion" was never withdrawn. It remained in force. At the time the "suggestion" was made, Smith held an option on all Rumsey's stock and was engaged in taking it over or "retiring" it, as Smith calls it. The acknowledgment by Smith, on behalf of the Drug Company, of Rumsey's right to the policy, that is, to change the beneficiary in the policy, was a part of the contract under which Smith obtained the option to take over Rumsey's stock, and if Rumsey did not have the right to change the beneficiary by the original contract he obtained that right by this latter contract. Under the latter contract he gave a valuable consideration for that right. That consideration did not fall by reason of the fact that Smith delayed taking over a part of the stock until after Rumsey's death. All questions of this kind are ignored in the opinion of the Territorial Court, yet these are things which raise equities in favor of appellant which should appeal to the conscience of any Chancellor.

The whole opinion discloses that the Territorial Supreme Court was diverted from a consideration of the merits of the case and determined adversely to appellant because it disagreed with the Trial Judge, on what may well be considered merely an abstract question of law, unnecessary to be determined in order to arrive at a determination of this controversy consistent with the high principles of equity and supported by every moral consideration.

III-IV.

We shall discuss the propositions III and IV together:

Mr. Rumsey takes up change of beneficiary with the Insurance Company.

June 8, 1907, the attorneys for Mr. Rumsey wrote the Insurance Company, calling attention to this policy and the circumstances under which it was taken out, and notifying the Company that Mr. Rumsey had severed his connection with the Corporation, Benson, Smith & Company, sold his interest therein, and removed to Colorado, and asked for a copy of the policy. After considerable correspondence between the Company and Mr. Rumsey's attorneys, the Company forwarded a copy of the provision of the policy with relation to change of beneficiary, and thereupon Mr. Rumsey signed the change on the form furnished by the Company as follows (Tr. 257-263).

> "The beneficiary under Policy No. 3442989, in accordance with the change of beneficiary clause thereof, is hereby changed from Benson, Smith & Co., Ltd. to Emma Forsyth Rumsey. The policy is not now assigned."

This change of beneficiary was forwarded to the Insurance Company about July 10, 1907, with notification to the Insurance Company that Mr. Rumsey was able, ready and willing to pay any and all premiums due under the policy, and a request that the Insurance Company notify Mr. Rumsey's attorneys when the premiums were coming due.

Correspondence ensued between Mr. Rumsey's attorneys and the Insurance Company, and between his attorneys and the Drug Company, the effort being to induce the Drug Company to forward the policy so that the Insurance Company might endorse the change of beneficiary thereon, and to show the Insurance Company that inasmuch as the policy was detained against Mr. Rumsey's right, the change of beneficiary which had been signed by Mr. Rumsey and forwarded to and was held by the Insurance Company, had effectuated the change. The Insurance Company, under date of "October 5, 1907", asked Mr. Rumsey's attorneys to

> "inform the insured that unless we hear from him within a reasonable length of time, we will return the request for change of beneficiary, with our records unchanged,"

to which the attorneys wrote, referring to their efforts to obtain the policy from Honolulu, stating:

> "We do not see why we should return the request for a change of beneficiary, nor do we see that the return of the same can change the legal rights of any of the parties; no more can the retention of the same by you."

Thus matters stood on May 6, 1910, when the attorneys for Mr. and Mrs. Rumsey wrote the Insurance Company, referring to the previous correspondence, stating:

> "The position of our clients * * * is that * * * under the circumstances of this case you are (not) permitted to deal with this policy, either by way of surrender * * * or otherwise, except at your own risk, without the consent of Emma Forsyth Rumsey."

The cessation of Mr. Rumsey's connection with the Company, the fact that he had parted with his stock therein is recited, and the Company is then notified:

> "We desire to make tender of the annual premium which * * * will become due June 11, 1910, and we will have such tender made at your office in New York, unless you feel that you can advise us that it may be made at the office of your Company in Denver, a procedure which would save us some trouble; *or advise us that in any event you will not receive or accept our tender, which, of course, will do away with the necessity of a tender.*"

Under date of May 13th, the Insurance Company replied to the last mentioned letter, acknowledging the receipt of the same, and stating that it had been placed on file and duly noted in the records of the Company, and saying:

> "You can make tender of the premiums due at our office in Denver, if you so desire."

The attorneys replied to this letter under date of May 16th, acknowledging the same, and saying:

> "In pursuance therewith, we shall make tender of the premium mentioned, at your office in Denver, Colorado."

On June 10th, the premium was paid into the branch office of the Insurance Company, at Denver, Colorado, and a receipt given by the branch office, reciting in effect that the branch office knew nothing about the matter and received the amount

> "only for transmission to the Home Office in New York."

On June 9th, Mr. Rumsey's attorneys in Denver wrote:

> "In pursuance of our recent correspondence, and permission to that effect contained in yours of the 13th ult., we on yesterday paid your office in Denver, $232.30, annual premium on this policy due today. Your Denver Office, having no advices on the subject, has accepted the money for forwarding only, and given receipt accordingly. We shall be pleased to have your early advices as to whether this payment is accepted."

Under date of June 17th, the Insurance Company acknowledged the last mentioned letter and added:

> "We have to inform you that we are now in receipt of advice from our Colorado branch, located at Jacobson Building, Denver, Colorado, that they received from you $232.30, on account of the premium due June 11, 1910, which amount will carry the policy up to June 11, 1911. We have this day written to our Honolulu branch, which office is in charge of the collection of premiums, directing them to countersign renewal receipt and forward same to you."

In the opinion of the Territorial Supreme Court these facts are erroneously stated and misinterpreted in the following language:

> "The payment was made to the agent of the Insurance Company at Denver, Colorado, by the attorney of the Rumseys. The receipt for the money given by the agent recites that the payment was received from the attorney 'for his accommodation and at his request' and that

> 'neither I nor the office of said company with which I am connected have any record or knowledge of said policy, or authority to collect a premium upon it" (Tr. 445).

The opinion wholly overlooks this correspondence which clearly shows that the money was not "paid", so to speak, to the agent in Denver at all. The Denver office was used as a mere means of transmitting the money to the Home Office, just as the Post Office or an express company or a bank might have been used—the Branch Office was so used with the consent of the Insurance Company.

The Insurance Company through the Home Office acknowledged receipt of this premium unconditionally.

The Territorial Supreme Court did not, apparently, apprehend the facts with respect to this.

This premium was retained by the Insurance Company until after the commencement of the suit in Colorado already alluded to.

The Insurance Company did not offer to pay the money back when it was notified by Mrs. Rumsey of the death of Mr. Rumsey, and asked to furnish her blank forms for proofs of his death.

The Insurance Company did not tender this money back when the proofs of Mr. Rumsey's death were furnished to it by Mrs. Rumsey.

The Insurance Company did not even tender the money back promptly after being sued. The suit was commenced August 15, 1910. Tender was made August 29, 1910.

We confidently submit that the rights which accrued

by reason of the acceptance of the premium by the Insurance Company, were not lost by the fact that the Company tendered repayment of the money nearly three months afterwards.

Running parallel with the correspondence with the Insurance Company, there was correspondence with the Drug Company. In May, 1910, the appellant, through her attorneys, notified the Drug Company not to pay any further premiums on the policy and referred to the fact that a notice, that the beneficiary had been changed, had been given to the Drug Company about the time the change was made. The letter stated the position of the insured and appellant to be, that if the Drug Company had ever had any right, as beneficiary, the right ceased when Mr. Rumsey's connection with the Company ceased, and stated that tender to the Insurance Company, of the amount of the annual premium to become due June 11, 1910, would be made by the Rumseys. Smith answered this letter, stating that the Drug Company was advised by counsel that its interest in the policy was unaffected by the attempt of Mr. Rumsey to change the beneficiary and making an offer to assign the policy and pay $1,000 for the remaining 50 shares of stock held by Mrs. Rumsey in the Company. There can be no dispute, therefore, but that Mr. Rumsey and the appellant did everything that could be done by them to obtain possession of the policy so that the change of beneficiary might be endorsed thereon "at the Home Office", and that it was because of the refusal of the Drug Company to comply with their demands that the endorsement was not made.

As was so well said by the learned trial Judge:

> "The maxim that equity regards as done that which should have been done, makes the refusal of the Drug Company to surrender the policy for endorsement ineffectual to accomplish the purpose of defrauding the widow of the insurance money".

It would seem clear that the physical possession of the policy, its retention by the Drug Company, can cut no figure in this case.

Suppose Rumsey had obtained physical possession and had had the endorsement made, would that have given the appellant any right, if she does not have that right now?

Suppose Smith had, like Rumsey, married and changed the beneficiary in his policy and had sent his policy to the home office and had the change endorsed. Would that have given any greater right to Smith's widow than the widow of Rumsey has?

The Drug Company is endeavoring to take advantage of its own fraud in insisting upon its refusal to deliver up the policy and the consequent failure to have the change of beneficiary made by the insured endorsed on the policy, in accordance with the condition subsequent printed in the policy.

We do not believe that this Court will tolerate such conduct. To do so would be to violate every rule of equity, justice and good conscience laid down by the great chancellors who have made equity jurisprudence the pride of the legal profession and the bulwark against injustice and fraud.

Courts of equity sit for the purpose of granting relief against fraud, not for the purpose of helping to perpetuate it.

The provision that Rumsey had a right to change the beneficiary was in the policy when it was issued. It always remained in the policy. When Rumsey undertook to change the beneficiary he undertook to exercise a right which the Drug Company had contracted with him and had contracted with the Insurance Company that Rumsey might exercise. It held the policy subject to this right and had no more authority to confiscate this right and appropriate it to its own use than it would have had to appropriate the property which the correspondence discloses Rumsey left in the Islands when the dreaded white plague drove him to the mainland.

The Drug Company seems to have a very distorted idea of what constitutes clean hands, equity, justice and good conscience. The learned judge of the trial court found that the refusal of the Drug Company to permit the change of beneficiary to be endorsed upon the policy was wrongful and that the wrongdoer cannot take advantage of its wrong. As this question was thoroughly and ably discussed by Judge Ashford in his opinion, we quote the following:

> "The physical possession of the policy in question was held, from first to last, by the Drug Company, whereby it became and continued impossible for the Rumseys to make literal and technical compliance with the provision of the policy regarding a change of beneficiary, to wit, that the policy should be forwarded to

the home office in New York, and there have the change endorsed upon it. The failure to secure such formal and technical change of beneficiary, and the endorsement thereof on the policy, (a change frequently requested by the Rumseys, who were balked in their efforts by the refusal of the Drug Company to deliver the policy for that purpose), has been and is urged as a defense herein by each of the defendants. But this is a Court of Equity, and it is one of the maxims of this branch of jurisprudence that 'equity regards that as having been done which should have been done'. I therefore regard this point of the defense as being not only highly technical, but utterly unmeritorious, and will consider and decide the case in all respects as though the change of beneficiary had in fact been made in accordance with the express terms of the policy itself. It would be not only inequitable, but intolerable to hold that the Drug Company could, by the mere fact of securing the physical possession of that piece of paper, and withholding it beyond the reach of the Rumseys, defeat the rights of the latter, (if any), to effect a change of beneficiary. Such a course of conduct should certainly not be approved by a court of conscience.

"In addition to consistent and repeated efforts of the Rumseys to secure such technical compliance as above, with the terms of the policy, respecting the endorsement thereon of a change of beneficiary, they formally and sufficiently notified the Insurance Company, long before the death of the insured, that he had changed the beneficiary in and under the policy, by substituting his wife, the present plaintiff, for the Drug Company. It is true that the

Insurance Company replied to this notice, or these notices, to the effect that the change could not be adequately effected except by the manual and physical delivery of the document itself at its home office, for the purpose of having such endorsement made,—but this plea was met by full explanation to the Insurance Company of the situation as it existed, and as above described. It is sufficiently obvious that no rights of the Insurance Company, or of any third party, suffered in the slightest degree through the failure, because of their inability as above described, of the Rumseys, to make manual and physical delivery of the policy at the home office of the Insurance Company for said purpose. Therefore, it would be grotesque, in the extreme, to hold that the Insurance Company could avoid or evade any equitable obligation to the plaintiff by virtue of such failure to obtain such endorsement. And it would be equally intolerable, and for the same reason, to hold that the Drug Company could obtain any right as against plaintiff, through the exercise or practice of the wrongful act, (if it was wrongful), involved in the withholding from the insured the physical possession of the policy in question, and thereby preventing the consummation of the physical act of the endorsement thereon of a substitution of beneficiary.

"There is no lack of authority for this proposition. An excellent discussion of this principle occurs in *Jory* v. *Supreme Council, etc.,* 105 Cal. 20, 26, 27. In that case, the beneficiary certificate taken out by a member of a fraternal order had been made payable to her daughter, and delivered into the custody of the latter. The mother later desired (in accordance with

the laws of the Order), to substitute her son as beneficiary, in place of the daughter. The daughter refused to deliver the certificate for the purpose of having the transfer made, at the head office of the fraternal Order. The mother fully informed the appropriate officials of the Order of her desire to substitute her son, and of the reasons of her inability to produce the document, as above, but, as in the case at bar, those officials refused to recognize such attempt at substitution, as a real substitution, or to issue a new certificate. The mother died, and the son brought suit to recover the death benefit. The Supreme Court of California, in deciding the case, used the following language, *inter alia*:

> "'As between them' (the son and the daughter), 'there was a substitution of beneficiaries in the eyes of a court of Equity. * * * As between these parties litigant, the court will administer justice from the standpoint of equity, and bring to the solution of this question, those broad principles upon the basis of which equity always deals. The general rule unquestionably is that a change of beneficiary cannot be made by the insured unless a substantial compliance with the laws and regulations of the society is had; yet courts of equity have recognized various exceptions to this general principle, and the facts of this case bring it squarely within one of the well-recognized exceptions. This exception is builded upon the principle that equity does not demand impossible things, and will consider that done which ought to have been done; and is embraced within the proposition that when the insured complies with all the requirements of the rules for the purpose

of making the substitution of beneficiaries, with which he has the power to comply, he has done all that a court of equity demands. * * * Impossibilities are not required, and if the certificate had been lost or destroyed, and thus the surrender made impossible, equity would have treated the surrender as duly made; and in legal effect the certificate was lost in this case. But there is another well-settled principle of equity equally fatal to appellant's claims. No person can take advantage of his own wrongs. No man is allowed to come into a court of equity, and reap beneficial results from his own iniquity. If Mrs. Jory had the right to make the change of beneficiaries, and did all that it was possible for her to do toward making such change, but was prevented by the acts of appellant from a consummation of her intentions, then appellant will not be allowed to derive any benefit from her fraudulent conduct. If a fraud of her own practicing prevented a legal substitution of beneficiaries, then as against her an equitable substitution will be held to have taken place' " (Tr. 409-13).

V.

Insurable Interest—Gambling Transaction.

The legal proposition upon which the defense is based is contained in the 18th clause of the Stipulation (Tr. 385), wherein what James H. McIntosh, general counsel of the Insurance Company, would testify if called as a witness is set forth as being

"that * * * by the laws of the State of New York * * * one person may take out insur-

> ance on his own life and make the insurance payable to any person, partnership, corporation or other beneficiary whom he may name in the policy, and such beneficiary thereof need under the laws of said State of New York have no interest nor continue to have an interest in the life of the insured."

This proposition seems to have caught the ear of the Territorial Supreme Court and to have impelled a determination adverse to the appellant, although there is no fact in the case which brings the transaction involved at bar within the legal principle laid down by Mr. McIntosh.

We may concede that what Mr. McIntosh was willing to swear to is the law and yet neither respondent can have any benefit from the concession.

The proposition that one may insure his own life, for the benefit of a stranger, is not involved here.

The reverse is the case.

Can a stranger insure my life or your life for his benefit?

Smith's idea and, according to Smith, the idea upon which the Drug Company's action in taking out this insurance was based, is set forth in Smith's letter *in re* taking out insurance "on the life of the President of the United States, the Emperor of Germany or any other person" (Tr. 161) quoted *supra.*

The real question here is, *has a corporation an insurable interest in the life of a stockholder, an interest which permits the corporation to insure the life of the stockholder as a wife may insure the life of a husband?*

That *this insurance was taken out by the corpora-*

tion, acting through its dominating and controlling member, George W. Smith, *and was not taken out by the insured,* is so conclusively demonstrated in the agreed statement of facts that attention need only be called to these facts. Argument and construction are unnecessary.

The statement of Smith in his letter to Rumsey of September 25, 1907 (Tr. 159), "I *required* that all of the stockholders in active service with me should take out policies * * * in favor of the corporation. * * * *This was a requirement of mine and a refusal so to do on the part of any one would have justified me in asking for the retirement of the party refusing"* should do, but we beg to quote from the deposition of Purdy, the special agent of the Insurance Company, *who was paid out of the first premiums:*

In answer to interrogatory 10, Purdy, who solicited the insurance on behalf of the Insurance Company, says:

> "Applications were made for insurance upon the lives of George W. Smith, A. J. Gignoux and Samuel L. Rumsey to me as agent of the New York Life Insurance Co., at the same time on June 11, 1903" (Tr. 249).

Answer to interrogatory 11 follows:

> "There were present Messrs. Smith, Rumsey and Gignoux in the office compartment of Benson, Smith & Co., in Honolulu. *I asked Mr. Smith if he had come to a favorable decision in the matter of taking insurance on the lives of the ACTIVE MEMBERS of the CORPORATION* for the benefit of the corporation in the

> event of its loss by the death of any one of the *ACTIVE MEMBERS.* He said (191) 'Yes, go ahead $5,000 each.' I sat at his desk and completed the three applications, making Benson, Smith & Co., the beneficiary in each application. Each applicant signed his application and *I allowed Mr. Smith to pick out a physician naming over five different examiners to make the examinations,* saying if for business reasons it was any advantage to him he could have his choice of examiners" (Tr. 249). (Italics and caps. ours, Tr. 249.)

In the language of the day Mr. Purdy was "onto his job". He let Mr. Rumsey pick out his own physician to make the examination. There is nothing in the record on the subject, but the facts suggest that it is not strange that a man who developed incurable lung trouble, very shortly after the policy was issued and had to give up business on account of this trouble, and who had to leave Hawaii a few months after delivery of the policy and who was only able to survive this dread disease for a few years by seeking the benefits of the climate of Colorado and California, passed such a good physical examination that Mr. Purdy wanted to insure him some more.

In interrogatory 21 the witness Purdy was asked for conversations with Rumsey with reference to the policy (Tr. 241). His answer follows:

> "After Mr. Rumsey had been examined for the corporation insurance in favor of Benson, Smith & Co. I suggested that he had passed a good examination and had better take out a policy on his own account. He said no, that he

> was a bachelor never expected to marry and called my attention to the longevity of his family as evidenced in the medical examination and said that he did not care to do any life insurance business on his own account" (Tr. 251).

This testimony of Purdy shows that it was not Rumsey who was insuring Rumsey's life. It was Smith—*alias* the Drug Company.

The Trial Judge in discussing the real purposes of the Drug Company in taking out the policy on the life of Rumsey, said:

> "The purpose lying at the root of the action of the Drug Company in taking out this policy, as well as the taking of the policies on the lives of Messrs. Smith and Gignoux, may here be appropriately discussed. It is true that the stipulation declares such purpose to have been,—'for the purpose of protecting the interests of said Benson, Smith & Company, Limited, in the event of the death of any of the said Samuel L. Rumsey, George W. Smith, and Alexis J. Gignoux, officers, directors and stockholders as aforesaid.'
>
> "The Stipulation provides (see Tr. p. 402) that the Court may find, if the correspondence, depositions, and other contents of the Stipulation so warrant, a different state of facts from those set forth in the Stipulation itself. Availing myself of this latitude, I now inquire whether the passage in the Stipulation, last above quoted, correctly states the fact respecting the purpose of the Drug Company in taking out the several policies indicated.

"Upon the argument, counsel for the Drug Company insisted that the real, if not the sole purpose involved, was (with respect to the Rumsey policy, for example), to give the Drug Company in the event of the death of Rumsey, a 'head-start' over possible competitors for the purchase of the Rumsey stock, in the form of a fund of Five Thousand Dollars. It has been insisted throughout that the Drug Company was and is a 'close corporation', allowing no 'outsiders', nor any persons except such as should pass muster before the remaining stockholders, to acquire stock therein. Involved in this was the further purpose to prevent their stock being acquired by competitors or enemies of the concern, whereby their books might be examined, to their possible prejudice. And therefore, it was deemed desirable to provide a fund that should at least give the corporation such 'head-start', in the effort to purchase the stock of a deceased stockholder, even though such fund should not be sufficient to pay for all of it. The great inequality in the number of shares owned by the three leading stockholders respectively (Smith, 363; Rumsey, 100; Gignoux, 30), might have suggested the wisdom of graduating the amount of insurance upon each life in some proportion to the stock held by each,—instead of which course, a uniform sum of Five Thousand Dollars each was determined upon. It will thus be seen that such sum would have paid for the Gignoux stock at par, and would have left a forty per cent balance; would have paid for only one-half of the Rumsey stock, and would have paid for a comparatively trifling proportion of the Smith stock. Some materiality attaches to this phase of the

case, in support of the conclusion at which I have arrived with respect to it, namely that this entire series of transactions constituted what, in law, are known as a wagering contracts,—and that the real purpose of the corporation in taking out the insurance in question, when stripped of verbiage and euphonious diction, was merely to speculate upon the lives of the three principal stockholders in the corporation. And this I find, in contradiction of the purpose stated in the Stipulation, but within the latitude allowed to me thereby, to have been the real and ultimate purpose of the corporation in so insuring the lives of its three officers as above.

"I find support for this conclusion in the correspondence and depositions referred to. The right of the Drug Company to hold, or even to take such insurance having been questioned by Rumsey (Stip. p. 33), in the course of a letter asking for 'an equitable settlement of the insurance policy on his life', and in which he held that the corporation had then no interest in his life to sustain its course in carrying the policy—'although it might have done so while I was actually connected with the Company as an officer',—the Drug Company replied (Stip. p. 37), contending that 'the corporation has a right to hold the policy on your life, on the life of the President of the United States, the Emperor of Germany, or any other person. * * * This is a fact that is often made use of by speculators.'

"In his deposition (answer to Direct interrogatory No. 15, Stip. p. 75), Mr. Smith testifies that he desired that such policies as above should be taken out in favor of the Drug Company, 'in order that the corporation, which was

a close corporation, might be protected in the event of the death of any of its officers. * * * The purpose of such insurance was to provide the company with funds, so that, in the event of any such death, it could purchase the stock of the deceased, and thus prevent the stock going on the open market.'

"Mr. Gignoux, answering direct interrogatory 7 (Stip. p. 86), testifies that Mr. Smith (President and Manager), stated to us 'that his reason for wishing us to do so (take out policies), were in order to protect the Drug Company in case of the death of any of us, so that the firm would be in a position to purchase the stock of each of us so dying, thereby carrying out the policy of the Company to remain a close corporation, and thus preventing outsiders and competitors from becoming stockholders in the corporation.'

"The Drug Company, in a letter to the Insurance Company, Sept. 13, 1910, after the death of Rumsey, (Stip. p. 159), reasserted its claim to the beneficial interest in the policy, stating that 'the insurance was effected on account of our interest in Mr. Rumsey's life as an officer and stockholder in our Company, and also to provide means to take up his stock in case of his death.'

"As early as Jan. 22, 1907, (Stip. p. 23), the Drug Company, in writing to Mr. Rumsey, suggested that the policy in question 'could be assigned to you by the firm after the payments for all your stock have been made, and on the repayment to the firm of the amounts expended for annual premiums, that is, if you should so desire it. The policy could then be placed for

the benefit of your wife'. Mr. Rumsey replied to the above, suggesting certain concessions in regard to the amount which he should pay on account of premiums already paid by the Drug Company, and on April 11, 1907, (Stip. p. 26), the Drug Company responded to that suggestion, using the following language, *inter alia,*— 'As a matter of fact, the business would prefer to carry the policy *as an investment.*' (Italics mine.)

" 'The object of this insurance was to protect the corporation against a sudden demand for funds in the event of the death of any of the principal stockholders.' Smith to Rumsey, Sept. 25, 1907; Stip. p. 36."

"But it would serve no good purpose to quote further from the Stipulation, or the depositions or correspondence therein contained, in support of the conclusion above announced. It is manifest to my mind that *the entire transaction involved in the taking out of the three* policies referred to, *notwithstanding all attempted linguistic disguises, was nothing more or less than a series of wagering contracts* wherein and whereby the Drug Company undertook to speculate upon the lives of its three principal stockholders. No other conclusion appears possible in view of the purpose, so often and so variously repeated, that the corporation so acted in order to provide itself with a fund wherewith to pay in whole, or in part, for the stock of any of those gentlemen who should be called by death. If such a transaction does not constitute a gambling upon the lives of those insured, than I am at a loss to conceive what would constitute such a condition. It was a commercial proposition,

> pure and simple, whereby the Drug Company undertook to advance certain premiums with the prospect and expectation of reaping financial profits in the event of the death of any of its three principal stockholders whose lives were covered by said policies respectively. And such transactions are forbidden by law, as being contrary to public policy, unless there be what the law describes as 'an insurable interest', on the part of (334) the insurer in the life of the insured."

The entire opinion of the learned trial judge is found in the Transcript, pages 404 to 432. The excerpts above quoted will be found at pages 416 to 421, inclusive.

With all due respect, we beg to submit that the opinion of the trial judge discloses much more thorough investigation of the facts and the law involved, than does the opinion of the Territorial Supreme Court. The opinion of the trial judge is, indeed, so comprehensive and covers the case so completely, in all its aspects, that we ought, perhaps, to apologize for not submitting the case of appellant upon it, thus sparing the Court this more extensive discussion.

How can the Drug Company seriously insist that Smith, Gignoux and Rumsey entered into a mutual agreement to insure their lives in favor of the corporation, when the facts which we have referred to show that Smith was the only man consulted, that Smith *determined,* that Smith *required,* and that failure to comply with his *"requirement"* would have *meant dismissal* of the recalcitrant employee?

It is quite apparent, from the tone of Smith's letters to Rumsey, that Rumsey was as much dominated by Smith as if, instead of being badged as treasurer, he had been the elevator pilot in the building or the clerk at the soda water fountain. This was because the nature of Smith was naturally stronger, a fact abundantly apparent from the correspondence.

Much has been attempted to be made, in argument heretofore, of the fact that Smith, Rumsey and Gignoux all took out insurance in the same amount. *This fact instead of making in favor of the legality of the transaction, labels it as a wager on life.*

Smith had *363 shares* of stock, Rumsey *100 shares* and Gignoux *30 shares.* If there had been a mutual agreement between three free agents dealing with each other at arm's length, Smith would have taken out a policy for twelve times as much as Gignoux, as he had a little more than twelve times as much stock, and Rumsey would have taken out a policy for at least three times as much as Gignoux, as he had a little over three times as much stock as Gignoux.

The truth is that neither Rumsey nor Gignoux had any say in the matter. Smith desired the insurance to be taken out and *compelled* them to take out the same amount of insurance that he, Smith, took out, regardless of the fact that he was the principal beneficiary.

The Trial Court in support of its conclusion that there was no mutual agreement entered into by and between Smith, Rumsey and Gignoux, said, on page 10 of the decision of the Court:

> "The great inequality in the number of shares owned by the three leading stockholders

> respectively, Smith 363; Rumsey 100 shares; and Gignoux 30 shares; might have suggested the wisdom of graduating the amount of insurance upon each life in some proportion to the stock held by each, instead of which, of course, a uniform sum of $5,000 each was determined upon."

This shows that Smith was gambling on the lives of Rumsey and Gignoux.

Whether we approach the consideration of the transaction from the standpoint that Rumsey was a stockholder and that the purpose was to provide funds to buy in his stock on behalf of the corporation in the event of his death, or whether we approach it on the proposition that he was in the employ of the company, although carrying the title of an officer, a legal obstacle intervenes which prevents the realization of the *scheme which it is now said was planned by Smith at the time he compelled Rumsey to allow this policy to be issued on his life.*

The trial judge says that the seven outstanding shares of stock in the Drug Company not owned by the three men on whose lives policies were issued were "held by three or four other parties in varying amounts" (Tr. 406).

Suppose the Drug Company had taken out a policy on the life of any one or more or all of these three or four other parties. In what different stead would the transaction stand?

The whole transaction is intolerable from the standpoint of law. No court which upholds the sound public policy that prevents gambling in lives through insur-

ance policies can for a moment consider sustaining this transaction.

It would appear from the record that the Insurance Company did not know that the Drug Company was an incorporated concern, but supposed it was a copartnership (see policy, Tr. 27). See Answer, Ins. Co., Tr. 77, Paragraph III.

These allegations, taken in connection with the other admitted facts, show gambling, pure and simple.

VI.

If an insurable interest such as would permit the Drug Company to insure Rumsey's life for its benefit existed at the time the insurance was taken out, such interest ceased when Rumsey retired from the Company.

Such interest did not exist at the time Rumsey changed the beneficiary and demanded the policy. What right, legal or moral, had the Drug Company to gamble on Mr. Rumsey's life and benefit by his death, when the Company had no business relations with him and was a stranger to him for years prior to and at the time of his death?

Human nature is pretty much the same the world over. The correspondence demonstrates that human nature does not change with climate. Rumsey was slipping rapidly into the grave. Realization upon the insurance policy seemed in sight. The opinion of counsel that the Drug Company could maintain the position now assumed, was obtained, and from an attitude of friendly solicitation for the welfare of the insured, the manager of the Drug Company changed his attitude to the stern and unyielding guardian of the finances of the Drug Company which he almost wholly owned.

An attempt was made in the brief in the Territorial Supreme Court to bolster up the claim of the Drug Company to the proceeds of this policy by the application of the principles on which the Virginia court rested its decision in

Mutual Life Ins. Co. v. *Board,* 115 Va. 836.

In that case *Board,* principal incorporator, president and general manager, *insured his life* in favor of the corporation, because it was shown that his death would result in a serious and substantial loss to the company.

The effort to find a parallel in the Virginia case is indeed far-fetched, as will be seen when we compare the attitude of Smith, head of the Drug Company, toward Rumsey's retirement from participation in the business of that Company. Under date of May 1, 1906, Rumsey wrote to Smith—"Dear George"—the pathetic letter found in Tr. 133, in which he says: "It was my hope and intention to end my days there & with the house. You have told me there is no further room".

This seems to have been written after conversations between Smith and Rumsey in Denver. On May 13th, '06, Smith wrote Rumsey from Honolulu. We quote from page 134, Tr.:

> "In all of my conversation with you in Denver I did not state to you as you have stated in your letter, I quote 'You have told me there is no further room' " (Tr. 134).

He then says that he had made a sort of examination of conscience after the interview to see whether he had said anything he would regret, or hurt Rumsey's

feelings, and justifies himself by the statement "I could not think that I had". Then follows:

> "What I endeavored to convey to you was that, while in your mind since your absence, matters had stood still and open waiting for your return, as a matter of fact things had continued to move and progress whether you or I, were present or on hand to direct. That the young men had advanced to positions of trust and knowledge of the business, that they were doing work that I had been doing, that you had done, that the position held by you was *most satisfactorily filled* by a man, who * * * was absolutely unbiased and aloof from any favoritism and free from the possibility of a charge of unfairness and that I should keep him there while I remained at the head of the business.
>
> I pointed out to you that it would be an injustice and a move that would cause loss of interest, if not withdrawal, to put either of the young men down to a lower position" (Tr. 134-135).
>
> * * * * * *
>
> I can only attribute your statement to a feeling of disappointment, one which is natural and which I, also, would feel and even now feel for *I realize that it is inevitable that, eventually, I too will have to step out to make room for the younger men that are coming forward."*

Even the pretense of the nominal relations between Rumsey and the corporation maintained by the creation of the office of Vice-President and carrying Rumsey's name in connection with the office, was not long main-

tained. Under date of December 25th, 1906, Rumsey wrote Smith:

> *"In deference to your wishes embodied in your letters & also conversation with me I tender my resignation* as Vice President & director of Benson, Smith & Co., to take effect as of 31st. This will reach you in ample time for annual meeting. I regret this necessity more than I can say or you realize. I desire you to dispose of all my stock at as early a date as possible" (Tr. 139).

In answer to this letter Smith wrote from Honolulu under date of January 22nd, 1907, as follows:

> "You are mistaken in thinking that I do not appreciate the regret that you feel in having to give your connection with the business, I appreciate it fully but, on the other hand, I realize, as you do not, the changes that have taken place in the business since your departure, now three years ago.
>
> There could never be a return to the old conditions, that is the conditions that prevailed while you were here. I would not consent to the substitution of the present Treasurer, Mr. MicGill, and the younger men have all come up in their positions and, without my consent, they could not be displaced from their positions.
>
> It is perfectly natural and, under the circumstances, a perfectly natural change that we have to recognize no matter what the regrets" (Tr. 140).

And learned counsel would persuade this Court that the man to whom those letters were written was so

necessary to the business of the writer of the letter that his loss could only be compensated by insurance!

Both Smith and Gignoux say that the insurance was taken out for the purpose of protecting the Company in the event of the death of any of its officers. Smith in the letter of September 25, 1907, says, "I required that all of the stockholders in *active service* with me should take out policies" (Tr. 159). Purdy in answer to interrogatory 11 (Tr. 249) says:

> "I asked Smith if he had come to a favorable decision in the mater of taking insurance on the lives of the *active members* of the corporation for the benefit of the corporation."

Rumsey was in *active service* only a few weeks to a few months after the policy was applied for. The exact time does not appear. He had ceased to be an officer of the company long before his death. He was not an officer at the time he determined to and did exercise his right to change the beneficiary. Half of his stock had been purchased by the Drug Company prior to that time, and the remainder was purchased by the Drug Company before the Drug Company brought its collusive suit against the Insurance Company for the amount of the policy. None of the purposes for which the policy has been variously said to have been taken out existed at the time the Drug Company collected from the Insurance Company. The Insurance Company was as well aware of this fact as the Drug Company.

The Record shows that Rumsey was an ordinary employee of the Drug Company, working for a mod-

erate salary; that his position could be filled by any drug clerk of ordinary ability; that when he severed his connection with the Company his place was promptly filled and the business of the corporation did not suffer by reason of his leaving the company. Smith in his letters to Rumsey strongly intimates that, on the contrary, the business was improved by the injection of younger and more vigorous blood. It does not appear that Rumsey possessed any special knowledge or qualifications necessary to the conduct of the business or any such qualification as would have caused any embarrassment to the Company in the event of his death. A corporation would have just as much right to insure the life of all its employees of every kind as this corporation had to insure the life of Mr. Rumsey.

MISCELLANEOUS.

Proofs of Death.

It is stipulated that Mrs. Rumsey made the only proofs of death ever presented to the Insurance Company. They were made on forms furnished by the Insurance Company. The Drug Company had no hesitation in availing itself of the proofs so made. In the complaint, in its "suit" against the Insurance Company, appears this allegation that "*the defendant corporation had due notice and proofs of death of said Samuel L. Rumsey*" (Tr. 378). The Insurance Company was as ingenious in its admission as was the Drug Company in its allegation. The answer "admits that * * * due notice and proofs of the death of said insured were made to the defendant". Notwithstanding the fact that the Drug Company had taken advantage

of the proofs of the death of her husband furnished by Mrs. Rumsey the Drug Company in its answer in the case at bar meets appellant's allegation that she had furnished these proofs of the Insurance Company (Tr. 314) with the statement "that this respondent is ignorant, and is, therefore, unable to admit or deny the allegation, and leaves the petitioner to her proof thereof". This answer is sworn to by George W. Smith (Tr. 141).

These and other facts drew from the Trial Judge the comment:

> "Following the decision of the Supreme Court of Colorado, the Drug Company brought suit upon said policy, against the Insurance Company, in this court. The Insurance Company answered setting up, in substance, the history of the Colorado litigation, and asking that the present plaintiff be made a party to the action (341). A trial was had in this court, jury waived, but no evidence was introduced on behalf of the defendant Insurance Company, to substantiate any of the allegations of the answer. It is true that a number of letters and other documents were 'filed for identification' which, if they had been regularly introduced and read in evidence, might have had the effect of procuring an order to bring in the present plaintiff as a party to the action,—though such a result may be considered as at least doubtful. Judgment passed in favor of the Drug Company for the full amount of the policy and interest, and that judgment has been paid.
>
> I am disposed to regard the action of the Drug Company against the Insurance Company, so prosecuted to judgment in this court, as hav-

ing been a collusive action. Although it was alleged in the answer of the defendant therein that the present plaintiff then was, as she had theretofore been, and has ever since continued, a claimant to the amount represented by the policy, yet no actual proof of those facts was adduced or offered, and nothing in effect appears to have been shown to the court except the policy itself, continuous payment of premiums by the Drug Company, and the death of Rumsey, whereby, upon the face of the record, as thus exhibited, the Drug Company became and was entitled to judgment.

But all parties concerned then well knew that this plaintiff was a claimant to the fund represented by said policy, and it is impossible to avoid the conclusion that the Drug Company, in particular (the Insurance Company, as above suggested, being unconcerned in the result, further than to obtain a judgment which might operate as a warrant to pay the amount of the policy to the Drug Company), sedulously and inequitably avoided any and all action which might have resulted in the intervention of the present plaintiff as a party to said action" (Tr. 429-431).

Memorandum of Terms of the Policy in Relation to an Absolute Beneficiary.

The insured may at any time by written notice to the Company at the home office declare any beneficiary * * * to be an absolute beneficiary under this policy. No * * * declaration of an absolute beneficiary shall take effect until endorsed on this policy by the Company at its home office. During the lifetime of any absolute beneficiary the right to revoke or change the interest of that beneficiary will not exist in the insured.

If any * * * absolute beneficiary dies before the insured the interest of such beneficiary will become payable to the executors, administrators and assigns of the insured.

Chronology of More Important Facts.

Insurance applied for in June, 1903.
Left the Territory in January, 1904.
Ceased to draw salary October, 1904.
Resigned as Treasurer February, 1905.
Married complainant herein August 31, 1905.
Sent notice to Drug Company of intention to change beneficiary in favor of wife shortly after Marriage, 1905.
Rumsey sold 100 shares Benson, Smith & Company stock to Mrs. Rumsey, July, 1907, and so notified the Company.
Mr. Rumsey changed beneficiary to Mrs. Rumsey, July 10, 1907. Change was filed with Insurance Company and Drug Company notified.
Mr. and Mrs. Rumsey gave option on the Rumsey stock in the Drug Company and sold 50 shares stock to Benson, Smith & Company, July, 1907, under said option.
New York Life Insurance Company accepted premium of $232.30 from complainant herein June 11, 1910.
Mr. Rumsey died July, 1910.
Mrs. Rumsey made Proof of Death, August, 1910.
Mrs. Rumsey commenced suit in Colorado, August, 1910.
Mrs. Rumsey sold balance of stock, 50 shares, to Benson, Smith & Company, January 12, 1911.
Mrs. Rumsey brought the present suit in Honolulu, June, 1915.

The Law of the Case.

Broad fundamental principles alone are involved.

There is nothing either technical or difficult.

There is no case reported in the books which furnishes a basis for the judgment of the Territorial Supreme Court.

Certainly no basis is found in the cases cited in the Opinion of that Court.

The Stipulation of Facts recites that Mr. McIntosh, General Counsel for the Insurance Company, was willing to swear that the law is set out in

Olmstead vs. *Keyes,* 85 N. Y. 593.

The opinion in that case is printed in the record, commencing Page 386.

The real question involved there was a surviving husband's right to the choses in action of his deceased wife (see p. 395). The whole of the case is embraced in the concluding paragraph printed on Page 401 of the transcript.

The husband had taken out insurance on his own life for the benefit of his wife, but in the name of a trustee.

The wife having died, and the husband having married again, by appropriate proceedings the second wife was made *cestui qui trust,* and the real controversy was between her and the children of the first wife. The right of the second wife to the proceeds of the policy was upheld, *on the ground that the husband had absolute disposition over the choses in action of the deceased wife.* How this case could be supposed to sustain the proposition that the head of this Honolulu Drug Com-

pany could compel his subordinates to take out insurance for the purpose of providing a fund to buy their stock when they should die, or for any other of the changeling and fugitive purposes which are, in the record, ascribed as the reasons of the Drug Company for taking out the insurance, is beyond our comprehension.

The fields of insurance law must, indeed, have been found barren of authorities supporting the position of appellees, when they are compelled to resort to the case cited and are so pertinacious about it that they insist upon having it set out in the Stipulation of Facts as the legal foundation of their claim.

The New York Court gave the proceeds of the insurance policy to the widow of the deceased.

The Trial Judge did the same thing.

The Territorial Supreme Court reversed the Trial Judge, but there is nothing in *Olmstead* vs. *Keyes* which warrants such reversal.

We are in entire harmony with the thought of Mr. Justice Earle, expressed in *Olmstead* vs. *Keyes.* We approve of it from a moral, from an equitable and from a legal standpoint.

The Territorial Supreme Court apparently attempts to justify its opinion by a quotation from

Grigsby vs. *Russell,* 222 U. S. 149, 154,

but being able to do so, undertakes to extend upon that decision, in a manner wholly unwarranted by anything contained in the opinion of Mr. Justice Holmes.

In the quotation from that Opinion found in the

Transcript (pp. 448-449) this language is used in referring to the assignment of the policy involved in the case:

> "The danger that might arise from a general license to all to insure whom they like does not exist. Obviously it is a very different thing from granting such a general license, to allow the holder of a valid insurance—upon his own life to transfer it to one whom he, the party most concerned, is not afraid to trust. * * * So far as reasonable safety permits it is desirable to give life policies the ordinary characteristics of property."

"The danger that might arise from a general license to all to insure whom they like", is the very danger which will exist if the Courts shall tolerate transactions such as shown by the facts in the case at bar.

The United States Supreme Court says in the case cited

> "cases in which a person having an interest lends himself to one without any as a cloak to what is in its inception a wager have no similarity to those where an honest contract is sold in good faith",

and adds that *Warnock* vs. *Davis,* 104 U. S. 775, is one of the strongest of the type of cases referred to.

The next authority cited, Vance on Insurance, p. 129, is not applicable, as in the case at bar there is no evidence showing that the Drug Company had any reason to expect any special benefit from the continuation of the life of Rumsey. And Vance in stating that there is an insurable interest wherever the assured has a reasonable expectation of deriving benefit from the

continuation of the life of the insured, refers to cases where the assured had some special interest in the life of the insured,—such as an old faithful servant, or an officer of the corporation who is absolutely indispensable to the conduct of its business, etc., but did not include an ordinary drug clerk of a corporation, whose official position was merely a matter of form in order to comply with the corporation laws. The same is true of May on Insurance, Sec. 76; and 25 Cyc. 706, cited.

It needs but a statement of the facts in

Conn. M. L. Ins. Co. vs. *Schaefer,* 94 U. S. 457-460,

to show that it cannot possibly be authority, in principle any more than in fact, for the decision of the Territorial Supreme Court. We beg to quote the first paragraph of the Opinion of Mr. Justice Bradley found on the title page of the Case:

> "This was an action on a policy of life assurance issued July 25, 1868, on the joint lives of George F. and Franzisca Schaefer, then husband and wife, payable to the survivor on the death of either. In January, 1870, they were divorced and alimony was decreed and paid to the wife. There was never any issue of the marriage. They both subsequently married again, after which, in February, 1871, George F. Schaefer died. This action was brought by Franzisca, the survivor."

First let it be noted that the Insurance Company was endeavoring to escape liability upon its policy altogether, and made points which are denounced in the opinion as "frivolous".

Even in such case Mr. Justice Bradley says that

> "the point relating to alleged cessation of insurable interest by reason of the divorce of the parties, is entitled to more serious consideration, although we have very little difficulty in disposing of it".

And continues:

> "A man cannot take out insurance on the life of a total stranger, nor on that of one who is not so connected with him as to make the continuance of the life a matter of some real interest to him."
>
> * * * * *
>
> *"The essential thing is, that the policy shall be obtained in good faith, and not for the purpose of speculating upon the hazard of a life in which the insured has no interest."* (Italics ours.)

And he quotes from Chief Justice Shaw:

> "All, therefore, which it seems necessary to show, in order to take the case out of the objection of being a wager policy, is, that the insured has some interest in the *cestui que vie;* that his temporal affairs, his just hopes and well-grounded expectations of support, of patronage, and advantage in life, will be impaired; so that the real purpose is not a wager, but to secure such advantages, supposed to depend on the life of another."

Justice Bradley continues:

> "Of course, a colorable or merely temporary interest would present circumstances from which want of good faith and an intent to evade the rule might be inferred."

Opinions must always be construed with reference to the facts of the case in which they were delivered.

Adopting this rule there is nothing in the Schaefer case which warrants a decision against the appellant in the case at bar.

In the case of *Warnock* v. *Davis,* 104 U. S. 775, cited, Chief Justice Field said:

> "If the insured is under a moral obligation to render care and assistance to the beneficiary in the time of the latter's need, then the latter has an insurable interest, other than a mere pecuniary one, in the life of the former."

It certainly cannot be contended in the case at bar that Rumsey was under moral obligation to render assistance to the Drug Company. Rumsey was paid a salary for what he did, and he rendered valuable services for the salary, and was under no obligation whatsoever to the Drug Company. Hence the case is not in point.

It seems strange indeed that the Supreme Court should cite, in support of its decision in denying this insurance money to the widow of the insured and giving it to the Drug Company, this statement:

> "It is not even necessary that kinship shall exist between the parties if the insured is under a *moral* obligation to render care and assistance to the beneficiary in the time of the latter's need, then the latter has an insurable interest, other than a mere pecuniary one, in the life of the former" (Tr. 452).
>
> *Thomas* v. *Nat. Ben. Assn.,* 84 N. J. L. 281, 282.

> "One not the wife, child, parent, brother, sister or creditor of insured may have an insurable interest in his life." *Kentucky Life & Acc.*

Our Courts, both Federal and State, have consistently and universally held that it is against public policy for any person or corporation to become the owner of insurance upon the life of a human being, where there is no insurable interest; and in support of that doctrine we cite the following selected cases:

We beg the Court to remember that in the case at bar the insured did not take out the policy on his life for the benefit of the Corporation, but the Corporation took out the policy on the life of the insured for its own benefit. The insured had no more to say about the transaction than a hitching post had about what should be hitched to it in the days when hitching posts occupied their own important place in civilized society.

In the case of *Victor* vs. *Louise Cotton Mills,* 61 S. E. 648 (16 L. R. A. (NS) 1020), the court said:

> "A manufacturing company has no implied power to insure the life of its president and carry the policy after he has retired from office."

This case is especially in point, as our contention is that even if the Drug Company had an insurable interest in the life of Rumsey at the time he insured his life, that interest ceased when Rumsey resigned as treasurer and vice-president of the Company. Of course, we contend that Drug Company never at any time had an insurable interest in the life of Rumsey.

In the case of *Cheeves* v. *Anders, Admr.,* 87 Tex. 287, the court held that want of insurable interest is just as absolute where it has ceased as where it never existed. Interest in a policy upon one member of a partnership held by the firm ceased upon the dissolution of such firm and the survivor has no interest in the

recovery. In the case above cited, Chilton insured his life in favor of Cheeves, who was his copartner, but prior to Chilton's death he sold all of his interest in the copartnership to Cheeves and, upon his death, the court held that Cheeves had no interest in the policy—Chilton having sold his interest in the copartnership prior to his death. In other words, that the insurable interest which Cheeves had in Chilton's life at the time they were copartners, ceased upon the dissolution of the copartnership by the sale of Chilton to Cheeves.

There is a clear distinction between a corporation insuring the life of its stockholders and officers and a partner insuring his life for the benefit of a copartner. *We have been unable to find any case upholding a policy taken out by a corporation on the life of a stockholder* and that, as we have shown, is the case before this Court. There is no case upholding life insurance taken out by a Corporation upon the life of an officer, under circumstances such as are disclosed here.

There is no case upholding such insurance, except cases *where the officer took out the insurance himself* for the benefit of the corporation *and where the officer was in addition indispensable to the corporation, and the corporation would suffer great damage by reason of the officer's death.* The Drug Company never attempted to show that Mr. Rumsey's connection with the Company was such as to make it indispensable or that it was even of any special value. The facts show conclusively that it was neither.

The question of an insurable interest is discussed very thoroughly in the case of *Ruse* vs. *Mutual Benefit Life Ins. Co.,* 23 N. Y. 516, 523, 527, wherein the court holds that at common law wager policies are void.

In the case of *Tate* vs. *Commercial Bldg. Assn.,* 97 Va. 74, 77, 82, the court holds that an assignee of a policy, having no insurable interest in the life of the insured, can only retain so much of the proceeds, when the insurance was lawfully effected, as is necessary to reimburse him for the premiums paid, expenses incurred and interest thereon (p. 78). So the only possible interest that Drug Company could have in the Rumsey policy would be the amount of the premiums paid by that Company. This is the decree of the trial Court * * *. It certainly would not under any theory be entitled to anything more.

In the case of *Gilbert* vs. *Moose,* 104 Pa. St. 74; 49 Am. Rep. 570, the court holds that where a party insures his life in favor of a stranger and the stranger assigns the policy to a third party for a valuable consideration, the heirs of the insured are entitled to the policy and not the assignee, as neither the assignee or the original beneficiary had any insurable interest in the insured.

In the case of *Schlamp* vs. *Berner's Admrs.,* 51 S. W. 312, the court held:

> "The assignment of a policy of life insurance to one who has no insurable interest in the life insured, is void as against public policy."

In the case of *Wilton* vs. *New York Life Insurance Co.,* 78 S. W. 403, the court holds:

> "There can be no recovery on a life policy by one having no insurable interest in the life insured to whom the policy was assigned after its issuance."

In the case of *Dugger* vs. *Mutual Life Insurance Co. of New York,* 81 S. W. 35, it is held that:

> "One to whom insured assigns his life policy, not being a relative of insured and not alleging an insurable interest in the life of insured or in the policy, may not recover thereon."

In the case of *Franklin Life Insurance Co.* vs. *Hazzard,* 41 Ind. 116, it is held:

> "A person cannot purchase and hold for his own benefit, as a matter of mere speculation, a policy of insurance on the life of one in whose life he has no sort of insurable interest."

The same is held in the case of *Heusner* vs. *Mutual Life Insurance Co.,* 47 Mo. App. 336.

In the case of *Quillian* vs. *Johnson,* 49 S. E. 801, it is held:

> "Irrespective of whether the holder of a policy of insurance on his own life may legally sell and assign the policy to one having no insurable interest in his life, the policy holder is certainly not at liberty to make the policy the subject matter of a purely wagering and speculative contract between himself and a person having no interest therein."

Certainly the Drug Company had no legal or moral right to insure the life of Mr. Rumsey in order that it might purchase his stock in the event of his death. Mr. Rumsey paid a valuable consideration for his stock and he was *under no obligation to provide funds for the Drug Company with which to purchase it at his death. If such insurance contracts were not*

against public policy and void, all corporations would insure the lives of all their officers and directors as it would be a good business proposition and a protection to the corporation. A corporation certainly has no more right to speculate on the life of one of its stockholders than an individual would have to speculate on the life of some stranger. Only under the most extraordinary circumstances have any courts ever held that a corporation has such an insurable interest in its officers or stockholders as to warrant it in insuring their lives.

It is also well settled that a creditor to whom a debtor sells a policy of life insurance on his life, acquired no interest therein beyond the debt which it was transferred to secure, as beyond this, the creditor had no insurable interest in the life of the insured.

Barbour's Administrator vs. *Larue,* 106 Ky. 546.

Consequently, we do not see how the Drug Company, Limited, can contend that it had any interest whatever in the insurance policy of Mr. Rumsey—even if it had an insurable interest at the time the insurance policy was taken out—other than to the extent of the premium paid by it.

The following cases are all along the same line as those we have above cited:

Schonfield v. *Turner,* 75 Tex. 324, 329, 330;

Gordon v. *Ware Nat. Bank,* 132 Fed. 444, 445, 450;

Trinity College v. *Travelers Ins. Co.,* 113 N. C. 244, 248;

Helmetag's Admr. v. *Miller,* 76 Ala. 183, 186, 188;

Continental Life Ins. Co. v. *Volger,* 98 Ind. 572;

Missouri Valley Life Ins. Co. v. *Sturges,* 18 Kan. 93-97.

We respectfully submit that the Judgment of the Territorial Supreme Court should be reversed and the judgment of the Circuit Court of the First Judicial Circuit of the Territory affirmed.

LORRIN ANDREWS,
W. B. PITMAN,
Attorneys for Appellant.

T. J. O'DONNELL,
Of Counsel.

No. 3444

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EMMA F. RUMSEY,

Appellant,

vs.

NEW YORK LIFE INSURANCE COMPANY and BENSON, SMITH AND COMPANY, LIMITED,

Appellees.

APPELLANT'S REPLY BRIEF AND BRIEF ON MOTION TO DISMISS APPEAL.

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THE MOTIONS TO DISMISS.

In the brief of Benson, Smith and Company, it is argued, *in limine,* that the appeal should be dismissed because, as they say, the decree appealed from is not a final decree. They cite many cases in support of this proposition. When these cases and all of the rules, with respect to the finality of judgments, announced by the Supreme Court of the United States, are analyzed, we think this court must hold that the judgment of the Supreme Court

of Hawaii *is a final judgment,* within the principles governing appellate jurisdiction, *as it unquestionably is in fact.*

The opinion of the Supreme Court of Hawaii ends as follows:

> "The decree appealed from is reversed and the cause remanded to the Circuit Judge for such further action compatible to this decision as may be necessary" (Tr. p. 452).

This language is copied in the decree (Tr. p. 453).

The decision is therefore made a part of the judgment and the lower court is directed to do what may be necessary, compatible to that decision. There is a direct order expressed in this judgment, which, upon investigation of the opinion, is found to be a *direction* ending all litigation between the parties.

The mandate of a Supreme Court is to be interpreted according to the subject matter of the proceedings and not in a manner to cause injustice.

> Wayne County v. Kennicott, 94 U. S. 498;
> Story v. Livingston, 13 Pet. 359.

The opinion delivered by an appellate court, at the time of rendering its decree, should be consulted to ascertain what is intended by its mandate.

> Re Sanford Fork & Tool Co., 160 U. S. 247.

To ascertain the true intention of the decree and mandate of the Supreme Court, the decree of the court below and of the Supreme Court must be taken into consideration.

> Mitchel v. U. S., 15 Pet. 52.

The opinion of the Supreme Court of Hawaii is found from pages 442 to 452 of the printed Transcript of Record. On page 452, at the close of the opinion, the court says:

> "The appellee, the New York Life Insurance Company, having paid the judgment rendered against it in favor of the beneficiary in said policy, Benson, Smith and Company, Limited, is absolved from any and all further liability under said policy."

This makes the judgment as final as it could be made, so far as the New York Life Insurance Company is concerned. In the opinion the court expressly says that Benson, Smith & Company, Limited, had an insurable interest in the life of Rumsey, and at the bottom of page 449, says that the policy, having been taken out by Rumsey, for the benefit of Benson, Smith & Company, under an agreement between the three principal stockholders, Rumsey could not afterwards change the beneficiary. That is a final and conclusive determination that the appellant has no interest in the policy and could have none under any conceivable change of beneficiary that might have been attempted to be made without the consent of Benson, Smith & Company. This is clearly a final determination against appellant and in favor of Benson, Smith & Company.

Under these circumstances the litigation of the parties, as to the purpose of the case, was terminated by the decree of the Supreme Court of Hawaii. It is true the case was remanded to the lower court

"for such further action *compatible to the decision* as may be necessary", but the only thing the lower court can do "*compatible to the decision" is to dismiss the case,* for every question was determined against the appellant, who was the petitioner below. If the Supreme Court of Hawaii had, in so many words, directed that the case be remanded and the petition dismissed, it would not have more effectively ordered the dismissal than it did by the judgment which it entered. After the judgment of the Supreme Court of Hawaii nothing remained to be done in the lower court to carry the decree of the Supreme Court into execution but to vacate the judgment against the defendants and dismiss the case. No other action can be suggested "compatible to the decision".

The form of judgments of reversal, when the possibility of further action by the lower court is contemplated by the appellate court, is, generally, "for further action not inconsistent with the decision".

(See Winn's Heirs v. Jackson, 12 Wheaton 135.)

The Hawaiian court has not left its judgment open, as the form of judgment quoted does.

The Hawaiian court uses the word "compatible", but the decree is positive.

"Further *action compatible* to the decision."

That is, action *following* the decision.

Action *in accordance with* the decision.

Compatible

(1) Capable of existing together.

(2) Congruous.

(3) Consistent.

In Winthrop Iron Co. v. Meeker, 109 U. S. 180, the court said on page 183:

> "The litigation of the parties as to the merits of the case is terminated and nothing now remains to be done but to carry what has been decreed into execution. Such a decree has always been held to be final for the purpose of appeal."

And the court cites Bostwick v. Brinkerhoff, 106 U. S. 3, and the cases there cited, and quotes from Forgay v. Conrad, 6th How., at page 204.

In La Bourgogne, 210 U. S. 95, the court says on page 112:

> "The authorities concerning the distinction between interlocutory and final decrees were cited in the opinion in Keystone Manganese and Iron Co. vs. Martin, 132 U. S. 91, and the subject is fully reviewed in McGourkey vs. Toledo O. C. R. Co., 146 U. S. 536. The rule announced in these cases for determining whether, for the purpose of an appeal, a decree is final, is in brief whether the decree disposes of the entire controversy between the parties and illustrations of the application of the rule are found in the late cases of Clark vs. Roller, 199 U. S. 541-546, and Ex Parte National Enameling Co., 201 U. S. 156."

In Des Vergers v. Parsons, 8 C. C. A. 526 (5th Circuit), the court said, on page 533:

> "The decree meets all the requirements of a final decree as it terminates the litigation on the merits of the case and settles the rights of all parties. Many cases can be cited in support of this conclusion from Ray vs. Law, 3 Cranch. 179, down to McGourke vs. Railroad Co., 146 U. S. 536, where the cases respecting final and interlocutory judgments are reviewed and the distinctions between them pointed out. We content ourselves with citing Grant vs. Insurance Co., 106 U. S. 430, where it is declared that 'the rule is well settled that a decree to be final within the meaning of that term as used in the Act of Congress giving this court jurisdiction on appeal must terminate the litigation of the parties on the merits of the case, so that if there should be affirmance here the court below would have nothing to do but to execute the decree it had already rendered'."

As we said *the judgment* of the Supreme Court of Hawaii *makes its decision a part of its decree* so that the true character of the judgment of that court can be ascertained upon the examination of its decision, and *that decision explicitly and conclusively terminates the litigation between the parties and determines every question on the merits.*

From the line of decisions of the Supreme Court of the United States cited above the rule for determining whether, for the purpose of an appeal, a decree is final, is *whether the decree disposes of the entire controversy between the parties, and if it does, it is final and appealable.*

It has been held, in innumerable cases, by the Federal Courts, that a final decree is one settling all matters in litigation within the pleadings and

that a decree is absolutely final where issues raised by the pleadings were all submitted and the court passed on all the merits.

Talley v. Curtain, 58 Fed. 4;
Maas v. Longstorf, 166 Fed. 41.

Under the decision of the Supreme Court of Hawaii, the lower court had no *judicial function* to perform. All it could do would be to exercise the *ministerial function* of dismissing the case as though it had been, in terms, directed to do so.

In McGourkey v. Toledo & Ohio R. R. Co., 146 U. S. 536, the court said, on page 545:

> "It may be said in general that if the court make a decree fixing the rights and liabilities of the parties and thereupon refer the case to a master for a ministerial purpose only, and no further proceedings in court are contemplated, the decree is final; but if it refer the case to him as a subordinate court, and for judicial purpose, as to state an account between the parties upon which a further decree is to be entered, the decree is not final."

And on page 546:

> "But even if an account be ordered taken, if such accounting be not asked for in the bill and be ordered simply in execution of the decree, and such decree be final as to all matters within the pleadings, it will still be regarded as final."

It is true that in some of the cases cited by the appellees in the brief it was *apparently* ruled that the *face* of the judgment is the test of its finality. The language used in those cases is appropriate to

the conditions presented by the cases in which used and while the court, in some of them, apparently made the face of the judgment the test of finality, yet the court always gave a reason for so doing drawn from the condition of the case presented; this is stated in the latest expression of the Supreme Court that we have been able to find.

In Carondelet Canal Co. v. La., 233 U. S. 362, the court said on page 372:

> "In La. Navigation Co. v. Oyster Commission of Louisiana, 226 U. S. 99, we repeat the test of finality to be the face of the judgment and express the reasons to be that this court cannot be called upon to review an action of the state court piecemeal. The language was appropriate to the condition presented by the case for the pleading in the case was left open for amendment."

To find a reason for making the face of the judgment the test of finality, the court went into the case and found it would have to review the case piecemeal so to state that the test of finality was the face of the judgment was appropriate to the condition which was found to exist, to wit: that the pleading was left open for amendment. And on the same page the court said:

> "In M. & K. Interurban Co. v. City of Olathe, 222 U. S. 185, a demurrer was sustained to the plaintiff's pleadings in the trial court and the supreme court did not direct a dismissal of the suit but left it stand in the court below. We held that the judgment sought to be reviewed was not one which finally determined

> the cause, and that we were without jurisdiction."

Here, again, the Supreme Court, in order to apply the test of finality of the face of the judgment, looked into the condition of the case. In the same case (233 U. S., page 372), the court takes up the case of Hazelton v. The Bank, in 183 U. S. 130, and shows that the test of finality of the face of the judgment is applied only when its application is appropriate to the condition presented by the case.

The court says:

> "In Hazelton v. The Bank, 183 U. S. 130, the action was against the national bank to recover, under section 5198 of the Revised Statutes for usurious interest alleged to have been charged. There was judgment in favor of the plaintiff in the action. It was reversed by the Supreme Court of the state on the ground that he had neither paid nor tendered the principal sum and the case was remanded for further proceedings. The case therefore was remanded for a new trial in its entirety. It was ruled that the face of the judgment is the test of its finality, and that this court cannot be called on to inquire whether when a case is sent back the defeated party might or might not make a better case."

There it was found that *the case was remanded for a new trial in its entirety.* That fact was ascertained only by looking into the opinion of the Supreme Court of the state, and after having ascertained that fact it was ruled that the face of the judgment is the test of its finality, but in that

case, as in the case at bar, the opinion of the lower court was a part of its judgment and was looked into to ascertain the finality of the judgment. On the same page in 233 U. S. the court says:

> "This rule (that the face of the judgment is the test of its finality) was again expressed in Schlosser v. Hemphill, 198 U. S. 173, in a case where the right to amend the pleadings existed and a new case could have been made."

Thus again showing that the rule that the face of the judgment is the test of its finality is only expressed when it is appropriate to the condition presented by the case. The judgment of the Supreme Court of Louisiana will be found in full, 129 Louisiana 322.

Winn v. Jackson, 12 Wheaton 135, throws no light on the question. The motion to dismiss was allowed without opinion. For aught that appears the court may have read the decision of the State Supreme Court to ascertain whether or not the judgment was final. Doubtless it did if there was one.

The action was in ejectment.

The remand was "for further proceedings not inconsistent with the decision".

In the case of Moore v. Robbins, 18 Wall. 588, cited by the appellees, the court said:

> "There the decree of the lower court was reversed and the case was 'remanded to the circuit court for such other and further proceedings as to law and justice shall appertain', *the*

ground of reversal does not appear in the record."

The mention by the Supreme Court of the fact that *"the ground of reversal does not appear in the record" shows that the ground of reversal would have been considered had it appeared in the record.* If the ground of reversal was not material, the court would not have mentioned it.

It is quite evident that the *opinion* of the Illinois Supreme Court did not appear in the record.

The action was to foreclose a mortgage, and decree in favor of complainant was reversed by the State Supreme Court. It is quite apparent from the very nature of the case that the litigation was not concluded by the judgment of reversal.

In District of Columbia v. McBlair, 124 U. S. 320, the question did not arise on motion to dismiss, or in any jurisdictional way, but rather by contention more in the nature of *res adjudicata,* the claim being that the matter involved had been previously adjudged against the District of Columbia by a decree of the general term, which was claimed to be final, against the District. The mandate of the general term remanding the cause was:

"To be *further proceeded with as the parties might be advised."*

How the parties might be advised is certainly an unknown quantity and such a judgment could not be final.

In the case of Smith v. Adams, 130 U. S. 167, cited, it is seen on page 171 that the lower court sustained a demurrer to the complaint and the plaintiff elected to stand upon his complaint without amendment and the same was dismissed. On appeal to the Supreme Court of the territory this judgment was reversed and the cause remanded to the district court for further proceedings according to law and the judgment of the appellate court. It is apparent in the condition of the case that under such an order of remand there was something to be done in the district court requiring judicial action on its part. The complaint having been held good on demurrer, it was incumbent upon the defendant to answer it and the cause would proceed to trial. It was under these circumstances that the judgment of the Supreme Court of the territory was held not final.

In Lodge v. Twell, 135 U. S. 232, the remarks of the United States Supreme Court were directed to the decree of the lower court, which, while it settled the equities of the bill, was clearly interlocutory, as, after the equities were settled, the property was to be sold by a receiver, accountings had and the amount ascertained that should go as a judgment against the defendants. And the court looked into the condition of the case to ascertain this.

Mr. Justice Fuller in his opinion says, p. 235:

> "The decree was interlocutory, not final, even though it settled the equities of the bill."

The following significant language is used in the opinion, p. 235:

> "What was left to be done was something more than the mere ministerial execution of the decree as rendered."

Hazelton v. Central Nat. Bank, 183 U. S. 130, is sufficiently commented upon in the opinion of Mr. Justice McKenna in Carondelet Co. v. Louisiana, *supra.*

> Louisiana Nav. Co. v. Commission, 226 U. S. 99-102;

We have already quoted the comment on this case embraced in the opinion of Mr. Justice McKenna in 233 U. S.

We invite the attention of this court to the fact that the opinion of Mr. Chief Justice White in the case conclusively shows *that the Supreme Court of the United States read the opinion* of the Supreme Court of the State of Louisiana *and considered it as part of the judgment,* and from it determined whether the judgment sought to be reviewed was final or not.

In the first paragraph of the opinion of Mr. Chief Justice White, portions of the opinion of the Supreme Court of Louisiana are epitomized. There it is said:

> "The court below elaborately reviewed the averments of the petition and expressed the opinion that in some respects a cause of action was stated."

Thus it is seen that the opinion is a part of the judgment, the face of which is to be scrutinized for the purpose of ascertaining whether or not the judgment expresses finality.

We have quoted from Mr. Justice McKenna, in 233 U. S., comment on Schlosser v. Hemphill, 198 U. S. 173-176, sufficient to show that the case was one where *the right to amend the pleadings* existed and a new case could have been made.

In all the cases cited it is apparent that it was possible to do something further. In the case at bar it is *not* possible to anything further.

THE "DECISION" (OPINION) IS A PART OF THE "DECREE". FOUND IN THE TRANSCRIPT (p. 453).

The trial judge must read the *decision* in order to ascertain what action is "compatible to the decision" just as much and as if the opinion were embodied in the decree.

Doubtless, the form adopted is in the interest of brevity. The form makes it unnecessary to repeat the language of the opinion, but makes the opinion part of the decree by reference.

Hurlbut Land Co. v. Truscott, 165 U. S. 719, and Oklahoma v. Neville, 181 U. S. 615—in neither case is there any opinion.

Estis v. Traube Davis Co., 128 U. S. 225-230, involved only the question whether the judgment

sought to be reviewed was a *joint* or *several* judgment, being held to be a joint judgment, it was determined that *one* judgment defendant could not sue out a writ of error without proper summons and severance in order to allow the prosecution of the writ by any less than the whole number of the defendants against whom the judgment is entered, and hence, *"for these reasons the writ of error is dismissed"*.

Memphis Keeley Inst. v. Keeley Co., 144 Fed. 628 (6th Circuit) is disposed of as authority by quoting the syllabus:

> "A decree dismissing a bill, in so far as relates to one branch only of the controversy between the parties, and that a subordinate one, leaving the principal issue in the case undetermined, is not a final decree, and it is not appealable."

Stillwagon v. B. & O. R. Co., 159 Fed. 97, may be disposed of by the following statements by Judge Cross who delivered the opinion:

> "* * * The writ of error in this case brings before this court for review the following order of the circuit court:
>
> 'And now, to wit * * * the plaintiff * * * having made a motion for leave to file an amended petition in the above case, leave to file the same is hereby refused.'"

Montana Ore Co. v. Butte etc. Min. Co., 126 Fed. 168 (9th Circuit), is likewise disposed of by the syllabus:

> "An order made by a court of equity pending a suit to enjoin trespassers on mining property,

> actual and threatened, for an inspection and survey of the *locus in quo,* is not a final judgment, order, or decree, and is not appealable."

Southern R. Co. v. Postal Cable Co., 93 Fed. 393 (4th Cir.). The syllabus is as follows:

> "An order in condemnation proceedings appointing commissioners to assess the damages is not a final order, to which a *writ* of error will lie."

Here are some of the tests of finality applied in cases cited:

> "The litigation of the parties as to the merits is terminated."

> "Nothing remains to be done but carry what has been decreed into execution."

> "Whether the decree disposes of the entire controversy between the parties."

> "Terminates the litigation on the merits of the case and settles the rights of all parties."

> "Has the court below judicial or merely ministerial functions to perform under the mandate."

The test whether the litigation is ended, by the judgment appealed from, if adopted in this case, can bring but one answer. It is not necessary to go to the *record* for the answer. The answer stands out in the opinion, which is a part of the decree.

No case has been cited and we have found none in which the appellate court has refused to read the

opinion of the lower court, to determine the question of the finality of a judgment announced in the opinion or to hold the judgment final, when the opinion showed it to be final.

An appellate court expresses its judgments in the form of written opinions. Is what is done, by such a court, to be ascertained from the opinion of the court or from what the clerk writes down, as his understanding of the opinion? If the opinion controls, then the whole opinion will be read (if necessary) to find out what the opinion means, decides, orders, adjudges; when that is done, in the case at bar, no uncertainty remains,—the opinion bristles with finality—the plaintiff's rights have been crucified and buried and only this court can roll the stone away.

In Hazelton v. Bank, cited, as construed by the United States Supreme Court in 233 U. S., the face of the record showed that "the case was remanded for a new trial in its entirety". But this fact was ascertained from the face of the judgment, including the opinion.

To the credit of our courts let it be said that there is no case cited in which, under analogous, much less parallel, circumstances, the judgment has been held not final.

Here are the circumstances which induced the decisions in the cases cited to support the motion.

Demurrer sustained without any judgment of dismissal. (Nearly all codes allow amendments as of right) Interurban Co. v. Olathe, *supra.*

Case remanded for a new trial in its entirety. Hazelton v. Bank, *supra.*

Case remanded for "such *other* and *further* proceedings as to law and justice shall appertain." Moore v. Robbins, *supra.*

Interlocutory decree for accounting, receiver, etc. Lodge v. Twell, *supra.*

One of several judgment defendants tries to review without summons and severance. Estis v. Trabue, *supra.*

Bill dismissed as to one part of controversy; other and more important parts retained. Memphis Keely Inst. v. Keely, *supra.*

Refusal of leave to file amended petition. Stillwagon v. B. & O. R. Co., *supra.*

Order for interlocutory injunction, etc. Mont. Company v. Butte Co., *supra.*

Messrs. Andrews & Pittman, the counsel who represented appellant in the Hawaiian courts, having been advised by cable of the pending motion, cabled back—

"Decision of Supreme Court dismissing petitioner's petition is final judication of all issues. Entry of judgment of dismissal in Circuit Court merely ministerial."

Citing 3 Corpus Juris, 458.

The effort of the legal profession is more and more directed, every year, toward eliminating from the administration of justice the things which have so gravely tended to create and foster distrust and

dissatisfaction with the results achieved in the administration of the law by the courts. Thousands of lawyers meet every year in bar associations and an examination of the reports of their proceedings will demonstrate that most of their time is spent in endeavoring to eradicate evils of practice just such as those of which the motion to dismiss, now before this court, is so good an example. The profession needs no higher tribute to its integrity of mind than the fact that it struggles, year in and year out, with unflagging zeal, and undiminished effort, to relieve the practice of the reproaches which judgments, such as that this court is now asked to pronounce, fasten upon the administration of the law. Time does not permit to notice any of these proceedings except those of the great nation-wide organization, the American Bar Association.

This association, after an effort lasting twelve years, had these words added to Section 269 of the Judicial Code, by an act approved Feb. 26, 1919:

> "On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

See

American Bar Association report 1917, p. 334;

A. B. A. Journal, July, 1917, Vol. 3, p. 507;

Report A. B. A. 1918, p. 77;
Report A. B. A. 1919, p. 63.

No case will soon be presented to this court to which the principle of this legislation is more applicable, nor to which that principle may be applied with greater merit or justice, for here everything of substantial right is clearly with the appellant. The appellees support their motion only on ground of technical errors, defects and exceptions, so attenuated as to be incapable of visualization and so far fetched as to be fantastical.

It must be apparent to the court that to dismiss this appeal, under the circumstances presented by this record, is to deprive the appellant of a plain right; the judgment of this court on the case presented by the record has been sought under such circumstances, and the case itself is of such a nature, as to forbid that the court should refuse appellant the benefit of that judgment, *unless compelled to this refusal by positive and affirmative mandate of the law.*

If the accident which has happened be fatal to appellant's right to this review, *she* must bear it though she will never be able to *understand* it.

A conclusion by this court, that the motion to dismiss must be granted, will add one more case to the dwindling number which the members of the legal profession may understand but cannot defend and give occasion, and even add, incentive to the efforts of the bar to correct, by legislation, that

which it is the concensus of professional opinion constitutes a reflection upon our judicial system.

Laches.

APPELLANT WAS NOT GUILTY OF LACHES AND THE STATUTE OF LIMITATIONS IS NOT INVOLVED.

Counsel, apparently, have entirely misconceived the nature of this action. The statute of limitation is not involved. It is a suit in equity and not at law. We deem it unnecessary to burden the court by discussing the question of laches at length. Neither is it necessary to discuss the cases cited on this question.

Even if the statute of limitations were applicable six years had not elapsed between the bringing of this action and the death of Mr. Rumsey. Mrs. Rumsey brought suit against the Insurance Company in Denver, Colorado, immediately after the death of Mr. Rumsey and diligently prosecuted it. After it was dismissed by the Supreme Court of that state, she promptly brought the present action. Never for a moment did she sleep on her rights but always proceeded with the utmost diligence. Mr. Rumsey died in 1910. The case at bar was instituted in 1915. It certainly cannot be claimed that the statute ran against her before her husband's death. Her right did not accrue until after Rumsey's death as she had no vested right in the policy during his lifetime: the beneficiary could have been changed by him at any

time he desired. When he died, her right in the policy vested and this action was brought within the statutory period. Even if the statute of limitations were applicable, this court could not possibly be justified in adopting the rule, sometimes adopted by courts of equity, that equity follows the law. To do so would put a premium on fraud. This court will not permit the Drug Company to take advantage of its own fraud. The facts in this case are such that there is not the slightest reason for this court to even attempt to apply such rule: all the equities are with the appellant.

This question of laches was very strongly urged before the trial judge. He disposed of it in language which we ask leave to adopt as part of our argument:

> "Laches on the part of the plaintiff is also alleged by counsel for the Drug Company as a reason why she should not prevail here, it being claimed that she allowed more than six years to elapse between the date (August 30, 1907) when her husband demanded delivery of the policy by the Drug Company, and the bringing of the present suit. I find no merit in this contention. Her claim does not rest upon the question of the physical whereabouts of the piece of paper whereon the policy of insurance is printed or written. I have held, as above, that the action of Rumsey, as herein described, in his efforts to obtain a substitution of beneficiary under the policy, constituted, became and was, and thereafter continued an equitable substitution, as effective in all respects for the purpose of the present suit, as though the policy had been forwarded to the home office in

> New York, and the substitution physically endorsed thereon. There is no question of replevin, or the right to replevy, involved in this case. The fact that the particular piece of paper involved reposed in the safe of the Drug Company instead of having been delivered to Rumsey, or to his wife, does not affect in the slightest degree her right of recovery herein. The Statute of Limitations is not involved."

With due respect to learned counsel, it strikes us as a curious and roundabout route by which they arrive at the conclusion that either the statute of limitations or laches ran against this plaintiff because Mr. Rumsey did not sue the Drug Company for the policy when the Drug Company declined to turn it over to him. Laches is never imputed, except in cases where through the neglect, delay or failure of the party against whom the laches is asserted, the party claiming the benefit of the doctrine has changed his position, to his disadvantage.

If the Rumseys had remained silent, asserted no claim to the policy, made no attempt to change the beneficiary and allowed the Drug Company to pay the premiums without notice of any kind it might well be argued that the Drug Company was entitled to invoke the doctrine of laches against plaintiff.

This is not the state of the record.

On the contrary, everything was done that could have been done and whatever the Drug Company did, toward paying premiums, from very shortly after the marriage of the plaintiff and the insured,

it did with notice that its claim now made, would be contested and it paid the later premiums which it did pay in defiance of the direction and request of the plaintiff and her husband, that it should not pay them, and with notice that the plaintiff and her husband desired to pay these premiums. The defendant *raced,* as it were, with the insured and his wife, to get ahead of them in the payment of the premium due June 11, 1910, and actually paid the premium two days before it was due (see letter of July 5, 1910, from Gordon, manager, to Jackson, comptroller, Tr. p. 282).

THE DEFENDANTS DO NOT COME WITH CLEAN HANDS.

A court of equity will not impute laches, neither will it follow the analogy of the statute of limitations, when the delay invoked as a defense is brought about or contributed to by the parties seeking the benefit of these equitable doctrines.

He, who would invoke the doctrines of equity, whether as a sword or as a shield, must present himself to the court with blade bright and shield shining and spotless. The collusive suit instituted by the Drug Company against the Insurance Company, all knowledge of which was kept from appellant, is forever an answer to the claims now put forward by the appellees.

The Drug Company had its opportunity to litigate its rights in the courts of Colorado and if the

Insurance Company or the Drug Company had made the effort to get the appellee into the courts of Hawaii which were made to get the Drug Company into the courts of Colorado, the record does not disclose any fact upon which to hinge a doubt that the effort would have been successful.

The complaint (Pars. XXIV and XXV,Tr. pp. 18-19) sets up the collusive suit between the Drug Company and the Insurance Company. This collusive judgment was satisfied February 28, 1913 (Tr. p. 384) and this cause of action then accrued to appellant.

The appellees invoke the doctrine of laches against appellant. They say that laches is to be imputed to her through her husband, because he did not commence litigation in his lifetime—that her legal rights were lost by his delay.

At the eleventh hour they have moved to dismiss this appeal.

The motion to dismiss was reserved until the eve of the hearing. It was served on attorneys for the appellant May 7, 1920, at Denver.

In the meantime appellant had paid over $700.00 court costs and costs of printing the record, and several hundred dollars more in the way of expenses necessary to present her case to this court.

This is the only laches in the case.

There is a circumstance of this case to which attention has been called briefly, which is worthy of further notice. This is the fact that the appellant furnished the only proof ever furnished of the death of her husband. We call attention, in the appellant's first brief, to the pleading in the "suit" of the Drug Company against the Insurance Company, to the *sneaky* nature of the allegations of the complaint, and the admission of the answer therein, on that subject and to the palpable falsehood contained in the answer of the Drug Company, in this case, respecting that matter. The conduct disclosed is not only inequitable; it is contemptible. No court of equity will strain its conscience to afford relief to the parties guilty of this conduct.

As we understand it, counsel who appear in this court for the Insurance Company are not the counsel who participated in the collusive suit in Honolulu. It must be assumed that they are under a misapprehension as to the facts with respect to that suit, otherwise they would not write these sentences found on page 59 of their brief:

> "Under the compulsion of that judgment, and not as a voluntary act, this appellee was compelled to pay Benson, Smith & Co., Ltd., the proceeds of the policy.
>
> This change in position was brought about solely by appellant's failure to bring a timely proceeding in the courts of Hawaii. By her failure to do so, which has resulted in the prejudice to the Insurance Company, appellant

has lost her right, if any such ever existed, to have the policy reformed."

The Insurance Company purposely kept the fact of the institution of this suit a secret from appellant. It let its co-defendant now, and co-conspirator then, have all the benefit and advantage of what the appellant had done to assert her rights to the proceeds of this insurance policy; it let the Drug Company have this benefit without her knowledge; it joins the Drug Company now in denouncing a failure of the appellant, to do that which they conspired to prevent her from doing, as fatal to her claim.

THE DRUG COMPANY IS WITHOUT ANY RIGHT ON THE THEORY OF THE CASE ADOPTED BY ITS COUNSEL.

Counsel for the Drug Company present "three possible theories of the transaction which resulted in the issuance of the policy and adopt as their own, the *third,* to wit:

> "The transaction was a mutual tri-party agreement * * * supported by a valid consideration moving between each one and the others of the three parties to the agreement." Brief Drug Co., p. 10.

This theory, of the first basic fact, differs from ours only in that it assumes Rumsey to have been a free agent when the transaction was had and that he entered into it of his own free will and accord. We pointed out in our main brief the

facts which show that *Rumsey had no say and exercised no will in the transaction.* We also discussed there the "alternative" adopted by counsel for the Drug Company as "the correct one" (Appellee's Brief, pp. 12 to 16). The brief of the Drug Company fails utterly to meet the proposition of law that *the language of the policy is part of the contract,* if the transaction was, as counsel now say, the result of a contract freely entered into by Smith Rumsey, Gignoux, the Drug Company and the Insurance Company. Counsel are, of course, compelled to rely on *contract* or on *coercion:* to claim (1) that Rumsey agreed that his life might be insured *by the Drug Company* for the Drug Company or (2) to *admit* that the Drug Company insured his life for its benefit, without regard to Rumsey's wishes or consent.

They choose the first alternative and, in so choosing, cast themselves into a pit almost as deep as that from which they would thereby escape.

Counsel nowhere question the fact that the terms of the policy entered into, and became part of, the contract under which, as they contend, the policy was taken out. This proposition rests on such universally accepted and sound legal principles that it cannot be questioned.

Counsel refer to the "transaction" under which the policy was applied for and issued as a "mutual tri-party agreement". This, of course, is mere inadvertence, if, as seems to be intended, Smith, Rum-

sey and Gignoux are referred to. The Drug Company and the Insurance Company were certainly parties to the "transaction", whatever its nature.

On page 14 counsel refer to the transaction in these words:

> "If, as we contend the fact here was, the policy was *part of a mutual agreement* between these men which rested on a valuable consideration moving between them."

We agree with counsel that "the policy *was part of a mutual* agreement", if there was such an agreement, and a most important part too. There is not a word in the record to indicate that the parties ever contemplated anything with respect to the terms of the policy which is not written into the policy. Suppose it were claimed here that Smith, Rumsey and Gignoux had agreed on some other disposition of the proceeds of the policy, than that written into the policy, such claim would stand on no different footing than the claim now made that the recital:

> "The insured, *having reserved the right,* may change the beneficiary * * * *at any time",*

is not a part of the policy.

The court cannot take this life insurance away from Rumsey's widow unless it can say that *these words of the policy mean nothing,* that they never meant anything, that they were eliminated from the policy by some magic not disclosed by the record. Counsel are too prudent to claim, in so many words,

the things which inevitably follow if their claim made be allowed. Some of these are:

The provisions respecting a change of beneficiary are nugatory.

The policy says the insured reserved the right to change the beneficiary. *The statement is false.* The policy says the insured may change the beneficiary at any time. *The statement is false.*

The policy provides for two classes of beneficiary:

(a) Named beneficiary

(b) Absolute beneficiary.

Benson Smith & Co. was *the named beneficiary,* as the policy was written but this is all wrong, false, a mistake. Benson Smith & Co. was the *absolute beneficiary* and these words of the policy apply to them, although the policy is not so written; "During the lifetime of an Absolute Beneficiary the right to revoke or change the interest of that beneficiary will not exist". True none of the *five* parties to the transaction (adopting the Drug Company's theory), the three individuals more or less concerned, nor the two corporations, ever so claimed before, but this court is asked to give this construction to enable the Drug Company and the Insurance Company to maintain the clandestine scheme under which the Drug Company sued and obtained judgment against the Insurance Company.

After having said that "The policy in question (which, of course, includes the provision for a

change of beneficiary) was part of a mutual agreement between three men, learned counsel for the Drug Company proceed naively to argue, that because one of the parties to the agreement was, thereby, clothed with dominion over the subject matter of the agreement, which dominion enabled this party to prevent another party to the agreement from exercising his rights thereunder, the courts can give the injured party no relief; such fact emasculates the agreement of its only potention benefit to one of the parties to the agreement, "cuts the heart out of the covenant", as it were.

If the recital of the policy that Rumsey had reserved the right to change the policy, at any time, be true, then this right was part of "the mutual agreement" and that which the policy required any other party to the agreement to do, in order that this reserved right might be exercised, such other party was required to do, on such terms as law and equity imported into the contract, *i. e.* refund of the premiums and interest. Failure to do what was so required was a wrong against the party in whose favor the right was reserved. And the wrongdoer now seeks to benefit by its own wrong.

Continuing the process of reasoning, to which the exigencies of the case drive them, counsel say:

> "Where a policy has been assigned, pledged or otherwise placed in the possession of one pursuant to some contract, the possession is an effectual pledge or guarantee that no change of beneficiary will be made. So long as the

> beneficiary holds the policy under such agreement, no change can be made."

And again, page 17:

> "If the policy in question is to be regarded as Rumsey's, then the uncontradicted facts show that he assigned or pledged it to Benson, Smith & Co., for a valuable consideration, namely, the payment of the premiums and the interest which Rumsey was given, through the company, in the policies on the lives of Smith and Gignoux."

One might as well argue that delivery of a pledged article to a pledgee is an effectual pledge or guaranty that the pledge will never be redeemed and that the refusal to deliver the pawn clothes the pledgee with all the rights of ownership.

"So long as the beneficiary holds the policy under such an agreement, no change can be made", continues the argument with an ingenuousness that is refreshing. So long as the pawnbroker refuses to let me redeem my overcoat, I must suffer the cold winds, like poor King Lear!

We do not gather from the correspondence between Smith and Rumsey, referred to on page 16 of the Drug Company's brief, the same meaning as that imputed by learned counsel. The significance of Smith's letter of January 22, 1907, is that he there recognized the right of Rumsey to change the beneficiary and the justice of the proposed change from the Drug Company to Rumsey's wife. Cupidity had not yet engaged in a contest with conscience

—and won. So the letter has all the advantages of contemporaneous construction. Of statements against interest, made *ante litem motem* and of interpretation by conduct inconsistent with the position now taken. We have elsewhere herein pointed to conduct of the Insurance Company showing a like construction on its part. Rumsey's correspondence with Smith shows that Rumsey always took the position that he had the right, which the policy says he had *"reserved"*. The correspondence was in no sense one relating to compromise, nor is it to be cast aside as a non-accepted offer, *it is an acknowledgment of a right.*

NO VESTED INTEREST IN THE DRUG COMPANY.

A consideration of the terms of the policy will show that it does not require any distortion of its provisions to sustain the claim of the appellant.

The contract with the insured is set forth in the policy itself.

Nothing has been adduced to vary this contract.

By the contract the insurer was to pay, on the death of the insured, to the beneficiary therein named, *or to such beneficiary as may have been duly designated.* There is no distinction, superiority or preference in rank.

By the terms of the contract, the insured *"reserved the right"* to *name who should take the proceeds* of the policy upon his death, just as

fully, and completely, and absolutely, as if no beneficiary had been originally named.

The following provision of the change of beneficiary clause, "The insured, having reserved the right, may change the beneficiary or beneficiaries at any time", is complete, when the things which the insured was, by the terms of the policy required to do, have been done.

There is contained in the policy only one reservation against the exercise of this power, and that is, at the time of exercise of the power, the policy must not *be assigned.*

When the change *takes effect* is a different question.

There does not seem to be room for doubt but that, under the terms of the policy, the insured had a right to *revoke the designation* of the beneficiary named in the policy *without appointing another.* If there could be any doubt about this the use of the word "revoke" in that portion of the change of beneficiary clause last above quoted clearly implies this right.

This being true, an *attempt* to designate another as beneficiary although the *attempt* might, for some technical reason, be *ineffective,* as a designation of a new beneficiary would amount to a *revocation* of the named beneficiary.

That what the insured did *amounted to a revocation* of the named beneficiary, cannot admit of dispute.

The *named* beneficiary took the policy *subject* to the right to *change* the beneficiary; *otherwise the terms of the contract must be altered and rewritten by the court.*

Aside from the first two paragraphs of the policy there is, running all through the policy, the idea that it, the insured, retains the right to assume and exercise *control* of the policy and its *proceeds.*

Thus, Tr. p. 28,

> "The policy participates in the profits of the company as herein provided."

The next paragraph states that if the insured is living on a day named,

> "The company will then apportion to this policy its share of the accumulated profits, and the insured shall then have the option of one of the following:
>
> "Six Accumulation Benefits.
>
> "(1) Receive the profits, *in cash* and continue this policy by payment of the same premium as previously; or
>
> "(2) Receive *the profits,* converted into an *annual income for life,* and continue this policy by payment of the same premium as previously; or
>
> "(3) *Receive the profits,* converted into additional paid-up insurance, subject to evidence of insurability satisfactory to the company, and continue this policy by payment of the same premium as previously; or
>
> "(4) *Receive the entire cash value* as stated below, *converted into an annual income for life, and discontinue this policy;* or
>
> "(5) *Receive the entire cash value,* as stated below, *in cash, and discontinue this policy;* or

"(6) *Receive the entire cash value,* as stated below, converted into paid-up insurance payable at death, and discontinue this policy."

A consideration of these and other clauses shows that in case of the continuation of the life of the insured, for the period mentioned, the *named beneficiary could receive no benefit from the policy without further action on the part of the insured,* and that, as these things go, *the insured,* and not the *beneficiary,* would reap the benefit.

In the clause of the policy commencing at page 28, it is provided that the company must send to the *insured* a statement of the results of the six accumulation benefits, and if the *insured* does not make selection, the policy "shall be converted into an annual income for life".

In such annual income for life, the *beneficiary could have no interest.*

The clause of the policy found on pages 29-30 provides for *loan values,* all for the benefit of the *insured,* and nothing for the benefit of the *beneficiary.*

In the second paragraph of the clause commencing on page 31, the *insured's* written request is to govern rights under the policy in case of failure to pay premiums, and in the next clause the provision for the payment of a premium in default is based on a request of the *insured.*

It will further appear that the *insured* had the policy at all times *absolutely within his power,* not

only by the right to change the beneficiary, to revoke the named beneficiary, to designate an absolute beneficiary, as it is called, but, by his choice of the six accumulation benefits, to *destroy any interest of the named beneficiary.*

The same thing might have been done by procuring a *loan* or by changing the mode of payment of the proceeds of the policy to installments, as provided in the policy.

And so, *in many other ways,* to which we do not deem it necessary to call attention, *all interest in or benefit* from the policy might have been taken away from the *named beneficiary.*

This being true, there never was any *vested right* in the named beneficiary.

The correspondence with the Insurance Company, relating to the change of beneficiary, begins with a letter from Mr. O'Donnell, attorney for the insured, dated June 8, 1907 (Tr. p. 257) requesting a copy of the policy. The reply of the Insurance Company, dated June 14, 1907 (Tr. p. 258) states: "Upon written notice from the INSURED * * * information * * * in regard to the policy" will be furnished.

Mr. Rumsey made a written request and the company complied with the request.

"The *insured*" was thus recognized as the person having the right *to control the acts of defendant with relation to the policy.*

A letter from the company dated June 27, 1907 (Tr. pp. 259-260) refers to the policy by number and name. It states the date, the amount, character of the policy, the age of the insured when written, the amount of the annual premium, and the time to which the premium had then been paid, and then follows this significant statement:

> "The policy is *written* in favor of Benson, Smith & Co. Ltd. or its legal representatives, *or to such other beneficiary as may be designated by the insured in accordance with the terms of the change of beneficiary clause in the policy, which reads as follows:*"

The change of beneficiary clause is then set out.

Note the language above quoted from this letter. *This is the construction placed upon the policy by the company.* We quote again:

> "The policy is written in favor of Benson, Smith & Co. Ltd. or its legal representatives, *or to such other beneficiary as may be designated by the insured.*"

It stands out clear, from the foregoing, that if the Drug Company had a vested interest in the policy by reason of the transaction under which the policy was issued or by reason of being the named beneficiary therein or by reason of any or all the facts now before this court, the company which issued the policy did not suspect it.

The fact that the insured was later furnished by the Insurance Company with a form for change of beneficiary and the language of that form preclude

the idea that the Insurance Company considered, at the time it furnished this form, that the Drug Company had a vested right.

The form recites that the change is made "in accordance with the change of beneficiary clause" (Tr. p. 261).

The brief filed by the Insurance Company, May 11, came to our attention late on May 12th.

Part V of this brief is devoted to the subject we are now discussing.

We think a fair reading of the brief discloses that counsel responsible for it have very little, if any, confidence in the theory of "vested rights" outlined in the Drug Company's brief and stated more at length in the Insurance Company's brief.

They, practically, defend against appellant's claim on the ground that the delivery of the policy to the Drug Company amounted to an assignment of the policy, by Rumsey.

Such an agreement must result from operation of law alone, for there is not a word in the record to support the idea that the parties ever had any thought of entering into such an agreement.

If there was an agreement between Smith, Rumsey and Gignoux which prevented any one of them from withdrawing his policy from the Drug Company without the consent of the other two, it was incumbent on the Drug Company to establish the

agreement. This it has not attempted to do. There is no suggestion of any such agreement in the correspondence between Smith and Rumsey, either in that which preceded or that which followed the rupture of their friendly relations. In our first brief we called attention to the fact that if there had been such an agreement the policy which it is now admitted was "part of the mutual agreement" would not have contained a provision that the insured "having reserved the right, may change the beneficiary * * * at any time".

In Grimbley Harrold, 125 Cal. 24, cited, the insured agreed not to change the beneficiary, whereas, in the case at bar, Rumsey not only did not agree that the beneficiary could not be changed but expressly *reserved* the right to make the change.

There is absolutely nothing by way of agreement, suggested by the record, which prevented Rumsey from changing the beneficiary just as the policy provides. Rumsey received no consideration, from the Drug Company, for permitting it to insure his life in its favor, hence the claim to the policy and its proceeds, under the theory of assignment by Rumsey to the Drug Company, is a later day thought, the result of conviction that something must be interpolated into the case, which is not in the record, to justify the affirmance of the judgment.

The object of life insurance is to provide a fund for those dependent upon the insured (Mutual Life Ins. Co. v. Lowther, 22 Colo. App. 623). Ordin-

arily the beneficiary of a life insurance policy is such a dependent. When one having some natural expectancy of benefit from the continuation of the life of the insured is named as beneficiary, different rules apply than those applied in cases where the beneficiary occupies a relation such as in the case at bar.

A policy of insurance does not create a vested interest in the beneficiary during the life time of the insured, when, by the terms, the insured reserves the right to change the beneficiary. Under such a provision the right of the beneficiary vests conditionally, not absolutely, and the insured, without the knowledge or consent of the beneficiary, may designate another, for the reason that the rights of the person named in the policy as beneficiary are subject to be defeated by the terms of the contract naming him as such. In other words, this is a condition of the contract, and his right is therefore subject to it.

Hopkins v. N. W. Ins. Co., 99 Fed. 199;
Mutual Life Ins. Co. v. Twyman, 92 S. W. (Ky.) 335;
Hopkins v. Hopkins, 17 S. W. (Ky.) 864;
Atlantic M. L. I. Co. v. Gannon, 60 N. E. (Mass.) 933;
Martin v. Stubbings, 18 N. E. (Ill.) 657;
Delaney v. Delaney, 51 N. E. (Ill.) 961;
Splawn v. Chew, 60 Tex. 532.

Hopkins v. Insurance Company, *supra,* is a very strong case in favor of appellant's contention and

we ask the court to read it carefully. The rights of the parties are settled by reference to the language of the policy. It is, in effect, held that there can be no such thing as a permanent or vested interest in a beneficiary named in a policy which contains provision giving the insured the right to change the beneficiary. Under such circumstances it is declared:

> "The right of the beneficiary is inchoate and a mere expectancy during such lifetime, and does not become vested until the death of the insured happens with the policy unchanged",

and Mr. Justice Gray asks this question, very pertinent, in the case at bar.

> "Has a beneficiary a 'vested interest' when the certificate or policy itself, the association's by-laws, and the statute under which it was incorporated all provide that the payee or beneficiary may be changed *at any time* without requiring the consent of such payee or beneficiary" (99 Fed., p. 201).

Cooley's Briefs on Insurance lays down the rule, without question or doubt, that in a policy of the kind here being considered, the beneficiary has no vested right, but merely an expectancy, while the insured lives. In Vol. 4, at page 3770, it is said:

> "The original beneficiary in whose possession the policy is cannot, however, defeat the change by refusing to surrender the certificate."

On page 3772 the author states in BOLD FACED type the above principle for which we contend, and supports it by innumerable authorities.

The rules of procedure in effecting a change of beneficiary are intended only for the protection of the insurer, and therefore may be waived by it.

Adams v. Grand Lodge, 105 Cal. 321-326; 45 Am. St. Rep. 45;

Simcoke v. Grand Lodge, 84 Ia. 383, 386, 387, 388; 15 L. R. 114;

Manning v. Ancient Order of Workmen, 86 Ky. 136, 140, 141; 9 Am. St. Rep. 279;

Grand Lodge v. Reneau, 75 Mo. App. 402, 409, 412;

Fanning v. Supreme Council, 82 N. Y. S. 733, 735, 736 (approved 178 N. Y. 629);

John Hancock Ins. Co. v. White, 20 R. I. 457, 459; 40 Atl. 5;

Supreme Conclave, Royal Adelphia v. Capella, 41 Fed. 1, 4-8;

Order of Patricians v. Davis, 129 Mich. 318, 319, 320;

Pacific Mut. Life Ins. Co. v. Carter, 92 Ark. 378, 387, 388; 123 S. W. 384.

If the Insurance Company has waived a strict compliance with its rules in regard to a change of beneficiary, *"or if it was beyond the power of the insured to comply literally with these regulations, or if the insured did all in his power to comply with them, then the original beneficiary cannot be heard to complain that the course indicated by the regulations of the defendant was not pursued".*

Lahey v. Lahey, 174 N. Y. 146, 154-158; 95 Am. St. Rep. 554;

Nally v. Nally, 74 Ga. 669, 675, 676;
Supreme Conclave, Royal Adelphia v. Capella, *supra;*
Jory v. Supreme Council, 105 Cal. 20, 27, 31;
Isgrigg, Executor v. Schooley, 125 Ind. 94, 99, 101;
Grand Lodge v. Child, 70 Mich, 163, 170-173;
Joyce on Ins. (2) Sec. 751;
Niblack on Ins. (2nd Ed.), Sec. 223.

In the Insurance Company's brief it is said (p. 45):

> "Appellant's whole claim is based upon the technicalities concerning the wording of the policy."

If to claim the benefit of the plain wording of a written instrument, of language incapable of construction, of an instrument which must have part of its terms torn from it before it can be given the meaning which appellees would put upon it, be technical, then appellant's claim is based upon technicalities.

It is to be noticed that the brief of the Insurance Company does not, any more than the brief of the Drug Company, take up the challenge in appellant's brief to answer why, if the parties intended what appellees now claim was intended, the Drug Company was not made absolute beneficiary. Why was the policy written, as we have it in the record, if

its provisions were mere sound and fury signifying nothing.

Under their heading "Errors Relied upon by Appellant" counsel use this language in stating their interpretation of one of our contentions (Insurance Co's. brief, p. 7):

> "(2) The Supreme Court of Hawaii erred in holding that the Drug Company was the absolute beneficiary under the policy."
>
> *"Absolute Beneficiary."*

The parties did not so name the Drug Company but the Insurance Company now asks the court to hold that company to be Absolute Beneficiary.

If the parties had been of the mind then, that the Insurance Company's counsel is of now, the term *"absolute beneficiary"* would have been used in the policy, in the same sense in which it is now used in the brief.

The term is in the policy but it is not hitched up as counsel would have this court hitch it.

We cannot concede the conclusion to which the authors of the Insurance Company's brief arrive under the heading commencing page 46 "The new offer—Its non-acceptance".

If what occurred betwen Rumsey and Smith, part of which is stated under this heading, but the whole of which we ask the court to read, were merely

a voluntary offer, based on no obligation, there might be some plausibility in the contention put forward.

It was not an offer as much as it was an acknowledgment, and the difference between Smith and Rumsey as to *the terms upon which Rumsey might exercise this acknowledged right did not detract from the force of the acknowledgment of the right.*

The words in Rumsey's letter "in taking over the policy I should prefer to do so at the June payment" simply relates to the time when the premiums should be refunded. Rumsey wanted the refund taken out of the payment which Smith was to make to Rumsey, for Rumsey's stock, in June following.

Nor is the language of Smith in his letter of April 11, 1907, correctly interpreted in the brief. The words,

> "We will therefore consider this matter as closed",

do not mean that the transaction is to be abandoned. What it means is that the transaction is concluded, and is to be finally settled on the terms contained in Smith's letter of January 22, 1907 (Tr. p. 140). Smith ended the argument. This is shown by his letter of September 25, 1907.

Counsel apparently admit the proposition that the Insurance Company might waive the provision

for endorsement of the change of beneficiary on the policy. In discussing the facts on which the claim of waiver is predicated however they endeavor to perpetuate the mistake of the Territorial Supreme Court, so clearly exposed in appellant's first brief, pp. 28-31. They continue to ignore the fact that this premium was accepted from the Rumseys at and by the Home Office in June 1910.

OTHER MEMORANDA AS TO THE INSURANCE COMPANY'S BRIEF.

Time prevents any extended consideration or discussion of this brief. We may only notice some of its more palpable lapses.

Thus on page 11, speaking of the circumstances under which the insurance policies were taken out, it is said:

> "While the record shows (Rec., p. 159) that Mr. Smith suggested that each of the principal stockholders should insure his life for the benefit of the corporation, there is no element of threat or of a refusal to comply with the suggestion in the entire transaction. On the contrary, the depositions which form part of the agreed statement of facts, and *which are the only evidence on that point,* unanimously support the contention that there was a voluntary agreement between the three principal stockholders." (Italics ours.)

Counsel have failed to read the letter of Smith to Rumsey dated December 25, 1907 (Tr. 159), printed on page 19 of our first brief.

On page 25 of the Insurance Company's brief after claiming that the Drug Company had a contractual interest in the policy and therefore its act in withholding the policy was not wrongful, it is said:

> "A court of equity must look thru the contract to ascertain the real intention of the parties."

So it should, but in the case at bar the court must look *beyond* the contract and have visions in order to hold that the real intention of the parties was expressed neither in the written contract nor in anything that was ever said between them nor in any single scrap of paper, which ever passed between them.

Both appellees claim that the Insurance Company has paid the Drug Company. We assume this to be the case. Trial judge found and the record conclusively shows that the two appellees dealt with each other covinously, to defraud appellant. That the combination formed, whatever may be its details, persists, is shown by the fact that the Insurance Company raises the question that if appellant's contention, as to the facts surrounding the taking out of the policy, be sustained, then there never was any liability on the policy. We think the Insurance Company is estopped, certainly the Drug Company is estopped, from making such a claim. The raising of the question is cumulative evidence of the fact that the combination against appellant continues.

Cammack v. Lewis, cited in the Insurance Company's brief is strangely like the transaction shown in the record when we compare Smith's holdings in the Drug Company with those of Gignoux, to say nothing of the discrepancy between the holdings of Smith and those of Rumsey. We are indebted for the citation of

Finnie v. Walker, 257 Fed. 698,

on page 41 of the Insurance Company's brief. It conclusively appears that Rumsey either "was a very sick man" at the time that the policy was taken out or that he became "a very sick man" shortly thereafter and "that the amount of the contract compared with what was paid, permitted playing for a large stake".

We cannot allow counsel to select our ground for us.

We expressly stated in our opening brief that we did not intend by the order in which we stated our contentions to indicate that we regarded any one of them as more persuasive, important or more conclusive than the other (p. 11). In that brief we showed conclusively, as we think, that Rumsey had a right, by contract with the Drug Company, to change the beneficiary.

We undertook to show the elements that entered into the contract, under which the policy was taken out, assuming it to be true, as contended by

appellees, that the policy was taken out as the result of a contract to which Rumsey was a party.

The Drug Company, in its brief, confesses our contention that the policy must be taken to be an integral part of such a contract.

The Insurance Company does not deny this contention. Both claim that, somehow, somewhere, by some chemic undisclosed or by some occult force undiscovered, the plain provisions of the policy, respecting change of beneficiary, were erased, obliterated and cut out of the contract. We say that the court will find these provisions just where they were put, at the time the policy was issued. They were not written in invisible ink. Everybody connected with the transaction knew all about them all the time and every act of everybody connected with the transaction is consistent with the idea that everybody understood everybody else's rights in just the sense the substituted beneficiary, wife and widow, now contends them to have been, until Smith and Rumsey disagreed or Rumsey's rapidly failing health aroused Smith's greed. And so we say, as we said in our original brief, that the question of insurable interests, either at the date of the policy or afterwards, the question whether the cessation of insurable interests changed the rights of the parties, the question of gambling contract, wagering on life and the like, the question of whether the Drug Company, thru Smith, agreed that the wife might be substituted as beneficiary, the

question of whether the Insurance Company waived the requirement that the change of beneficiary should be endorsed on the policy and even the tergiversations of the two corporations which combined to resist appellant's claim, may be left undecided because there is no difficulty, either in law or in fact, in the way of holding the appellant entitled to recover under the contract which, as appellees contend, originated whatever rights any party to the litigation ever had as well as the obligation of the Insurance Company.

We do not, however, waive any right of appellant and we have mentioned the time when we received the Insurance Company's brief in order that the court may understand that failure to reply the various phases thereof is caused by lack of time and not by acquescience of its contentions.

Respectfully submitted,

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NO. 3444

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

EMMA F. RUMSEY,

Appellant,

vs.

NEW YORK LIFE INSURANCE COMPANY, and BENSON, SMITH & COMPANY, LIMITED,

Appellees.

BRIEF OF BENSON, SMITH & COMPANY, LIMITED, ONE OF THE APPELLEES

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Filed this.....day of....., 1919.

F. D. Monckton, Clerk,

By....., Deputy Clerk.

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Appellees.

BRIEF OF BENSON, SMITH & CO., LTD., ONE OF THE APPELLEES

STATEMENT OF THE CASE.

On June 13, 1916, Emma F. Rumsey, the appellant, filed in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, at Chambers, her amended bill in equity, in which she prayed that the policy issued by the New York Life Insurance Co. on the life of Samuel L. Rumsey, on June 11, 1903, be reformed by declaring her to be the beneficiary thereunder; that the New York Life Insurance Co. be decreed to pay to the complainant the amount specified in said policy ($5000), with interest from July 27, 1910; that Benson, Smith & Company be declared the trustee for the complainant of said policy upon payment by her of such sums of money as it may have

paid as premiums on said policy on her behalf; and for general relief (Tr., pp. 20, 21).

On October 10, 1916, Benson, Smith & Company filed its answer, admitting many of the averments contained in the amended bill of complaint, denying the vital averments on which the complainant based her claim for relief, and setting up laches as an affirmative defense (Tr., pp. 101-113).

The case was then submitted to the trial judge upon an agreed statement of facts (Tr., pp. 117-403) in which was included certain correspondence (Sec. IV, p. 130; Sec. VI, p. 255; Sec. VIII, p. 282) and certain depositions (Sec. V, p. 187), and it was agreed (Sec. XIX, p. 402) that testimony could be introduced at the hearing, and that in the event of any conflict between any stipulated fact and any deposition, document or evidence in said stipulation, or evidence adduced at the hearing, the court could disregard any such statement and consider in lieu thereof such other deposition, document or evidence. The trial judge referred to that clause (Tr., p. 416) in connection with his ruling that the policy in question was a wagering contract. His conclusion on that point, however, was a conclusion of law, and not a finding of fact. Whatever it was, it was overruled by the Supreme Court.

The agreed facts were, in substance, (1) that Benson, Smith & Company, Limited, was incorporated in 1898 for the purpose of buying, selling and dealing in and manufacturing drugs, medicines and other commodities pertaining to said line of business, with

a capital stock of $70,000, divided into 700 shares of the par value of $100 each (Tr., pp. 118-121); (2) that on June 11, 1903, Samuel L. Rumsey made application to the New York Life Insurance Company for insurance on his own life in the sum of $5000 (Tr., p. 121); (3) that since the year 1903 the said Samuel L. Rumsey, and one George W. Smith and one Alexis J. Gignoux were officers, directors and stockholders of and in said Benson, Smith & Company, Limited, the said Smith being president, the said Rumsey being treasurer, and the said Gignoux being secretary thereof (Tr., p. 122); (4) that for the purpose of protecting the interests of the said Benson, Smith & Company, in the event of the death of any of the said Rumsey, Smith and Gignoux, the said Rumsey, Smith and Gignoux agreed to take out a policy of insurance in the sum of $5000 on their respective lives in favor of the corporation, and that in accordance with said agreement the policies of insurance so taken out were placed in the custody and possession of Benson, Smith & Company, the beneficiary named in each of said policies (Tr., p. 122); (5) that said applications were accepted by said New York Life Insurance Co. and policies issued thereon, which were executed at the home office of said company at New York and delivered to Benson, Smith & Co. at Honolulu (Tr., pp. 123, 124); (6) that the policy so issued to the said Samuel L. Rumsey provided that "The insured, having reserved the right, may change the beneficiary or beneficiaries, at any time during the continuance of this policy, by

written notice to the company at the home office, provided this policy is not then assigned. * * * No designation, or change of beneficary or declaration of an absolute beneficiary, shall take effect until endorsed on this policy by the company at the home office (Tr., p. 125); (7) that after the execution and delivery of said policies Benson, Smith & Company paid and continued to pay all premiums due thereunder (Tr., p. 127); (8) that at the time of the delivery of said policies the said Smith owned 363 shares, the said Rumsey owned 100 shares and the said Gignoux owned 30 shares of the capital stock of the corporation out of a total of 500 shares issued (Tr., p. 127); (9) that on August 31, 1906, the complainant, Emma F. Rumsey, and the said Samuel L. Rumsey were married at Denver, Colorado, and thereafter lived there until the death of Rumsey (Tr., p. 128); (10) that on July 9, 1907, Rumsey transferred his said 100 shares of said capital stock to the complainant, and shortly thereafter she sold 50 shares thereof to Benson, Smith & Company, and after the death of said Rumsey the complainant sold the remaining 50 shares to said company (Tr., p. 128); that in January, 1904, Samuel L. Rumsey left the Territory of Hawaii and was never again actively connected with Benson, Smith & Company, or its business, and in February, 1905, he ceased to hold the office of treasurer and never thereafter drew any salary or compensation from the company (Tr., pp. 128, 129); (11) that until the recovery of judgment by Benson, Smith & Company against the New York

Life Insurance Company for the amount of said policy, Benson, Smith & Company held said policy, claiming the right to hold the same under and by virtue of the agreement relating thereto above referred to (Tr., pp. 129, 130); (12) that no change of beneficiary was ever at any time endorsed upon the policy though a request to have Emma F. Rumsey so named in place of Benson, Smith & Company was made by Samuel L. Rumsey on July 9, 1907, the reason being that the policy did not accompany the request, since Benson, Smith & Company held possession of it under the claim that it was entitled to possession of the policy and to the proceeds thereof in the event of the death of Rumsey (Tr., pp. 255, 256); that on June 11, 1910, the complainant caused to be remitted to the New York Life Insurance Company, the amount of the annual premium upon said policy, but it had already been paid by Benson, Smith & Company, and was thereupon tendered back to the complainant, who refused to accept it, and it was finally paid into court in an action instituted by the complainant against the New York Life Insurance Company in the District Court of the city and county of Denver, Colorado, where it has since remained (Tr., pp. 268-272); (13) that the said Samuel L. Rumsey died at Los Angeles, California, on July 27, 1910, leaving the complainant his lawful wife (Tr., p. 302); that on August 15, 1910, proofs of death were presented to the New York Life Insurance Company by the complainant on forms furnished to the complainant by the company (Tr., p. 302); (14) that

the company has at all times refused to pay the amount of the policy or any part thereof to the complainant (Tr., p. 306); (15) that on August 15, 1910, said Emma F. Rumsey instituted suit against the insurance company in the Denver court to recover the amount of the policy, but her complaint was dismissed, and the judgment was affirmed by the Supreme Court of Colorado; *Rumsey v. New York L. I. Co.,* 147 Pacific 337 (Tr., pp. 314-320); and (16) that on February 24, 1913, said Benson, Smith & Company recovered judgment against the New York Life Insurance Company for the amount of the policy, with interest and costs, which the company paid (Tr., pp. 375, 376, 384).

The circuit judge rendered a written opinion (Tr., pp. 404-432) upon which a decree was entered awarding judgment against the New York Life Insurance Company for the sum of $5000, with interest from August 15, 1910, and costs; decreeing Benson, Smith & Company trustee for the complainant with respect to the proceeds of the judgment recovered by it against the insurance company; awarding judgment against Benson, Smith & Company in the sum of $5959.55, with interest from April 3, 1913, less the sum of $1858.40, with interest from the date of the payments by it of premiums on the policy, and costs; and providing that the complainant should first have recourse against Benson, Smith & Company (Tr., pp. 433-436). From that decree the respondents appealed to the Supreme Court of Hawaii (Tr., p. 437) and obtained a reversal (Tr., pp. 442-452). The de-

cree was entered on October 2, 1919, remanding the cause to the circuit judge for further action compatible to the decision of the Supreme Court (Tr., p. 453). From that decree this appeal has been taken (Tr., p. 454), and the record does not show what further proceedings were had in the court below to which the cause was remanded.

ARGUMENT.

IN LIMINE. THE APPEAL SHOULD BE DISMISSED BY THIS COURT BECAUSE THE DECREE APPEALED FROM WAS NOT A FINAL DECREE.

By the decree entered by the Supreme Court of Hawaii, from which the present appeal has been taken, the decree of the circuit judge was "reversed and the cause remanded to the circuit judge for such further action compatible to the decision as may be necessary."

The judgment or decree of the highest court of a state (or Territory) remanding the case for further proceedings not inconsistent with the judgment or decree is not a final judgment or decree.

Winn v. Jackson, 12 Wheat. 135.
Moore v. Robbins, 18 Wall. 588.
District of Columbia v. McBlair, 124 U. S. 320.
Smith v. Adams, 130 U. S. 167.
Lodge v. Twell, 135 U. S. 232.
Haseltine v. Central Nat. Bank, 183 U. S. 130.
Louisiana Nav. Co. v. Commission, 226 U. S.

The form of the judgment is the test of its finality.

Haseltine v. Central Nat. Bank, supra.

Louisiana Nav. Co. v. Commission, supra.

Schlosser v. Hemphill, 198 U. S. 173.

Congdon v. People, 200 U. S. 612.

A judgment of reversal is final only when it also enters or directs the entry of a judgment which disposes of the case.

Smith v. Adams, supra.

Hurlbut Land Co. v. Truscott, 165 U. S. 719.

Oklahoma v. Neville, 181 U. S. 615.

It being a jurisdictional defect the appellate court will dismiss of its own motion.

Estis v. Traube Davis Co., 128 U. S. 225.

Memphis Keeley Inst. v. Keeley Co., 144 Fed. 628.

Stillwagon v. B. & O. R. Co., 159 Fed. 97.

Montana Ore Co. v. Butte, etc., Min. Co., 126 Fed. 168.

Southern R. Co. v. Postal Cable Co., 93 Fed. 393.

ON THE MERITS. THE APPELLANT IS NOT ENTITLED TO ANY RELIEF.

The bill of complaint averred (par. IV, Tr., p. 4) that Rumsey made application for an insurance policy upon his life upon which the insurance company issued the policy and delivered it to Rumsey at Honolulu, and that (par. VII, Tr., p. 6) by reason of the connection of Rumsey with Benson, Smith & Co.

(i. e., as treasurer) the policy passed into the physical possession of the said Benson, Smith & Company and was left in its possession when Rumsey departed from the Territory.

The agreed facts, however, stated the circumstances somewhat differently. It there appears that (par. III, Tr., p. 122) for the purpose of protecting the interests of Benson, Smith & Company in the event of the death of any of them, the said Smith, Rumsey and Gignoux agreed to take out a policy of insurance in the sum of $5000 on their respective lives in favor of Benson, Smith & Company, and that in accordance with said agreement the policies of insurance so taken out were placed in the custody and possession of Benson, Smith & Company.

The trial judge and the Supreme Court of Hawaii properly adopted and acted upon the facts as they were set forth in the stipulation and not as they were imperfectly stated in the bill of complaint; the trial judge, however, misapplied the law to the facts.

The trial judge took the view that the entire transaction was nothing more or less than a series of wagering contracts wherein and whereby Benson, Smith & Company undertook to speculate upon the lives of its three principal stockholders (Tr., p. 420). In saying that the trial judge seems to have proceeded upon the notion that Benson, Smith & Company had taken out the policy on the life of Rumsey. If that were the case an insurable interest in Rumsey's life would have been necessary. The trial judge then expressed the further views that Benson, Smith

& Company, at the time the policy was taken out, had no insurable interest (Tr., p. 422), and that if there had been an insurable interest at that time it had ceased when Rumsey's relationship to the company was dissolved (Tr., p. 426).

We will refer briefly to the three possible theories, and endeavor to show that upon reason and authority the appellant could prevail upon none of them.

First. If Benson, Smith & Company did insure the life of Rumsey for its own benefit there was an insurable interest to support it, and the fact, if it were such, that the insurable interest terminated before Rumsey died would not defeat the company's right to receive the proceeds of the policy. *Second.* If, as averred in the bill of complaint, Rumsey insured his own life in favor of Benson, Smith & Company, no insurable interest was necessary. *Third.* If the transaction was a mutual tri-party agreement, as set forth in the stipulation of agreed facts, it was supported by a valid consideration moving between each one and the others of the three parties to the agreement. We think this latter alternative is the correct one.

Benson, Smith & Company had an insurable interest in the life of Rumsey.

"An insurable interest exists whenever the relation between the assured and insured, whether by blood, marriage or commercial intercourse, is such that the assured has a reasonable expectation of deriving benefit from the continuation of the life of the

insured, or of suffering detriment or incurring liability through its termination."

Vance on Insurance, p. 129.

"Although, as was said by Mr. Justice Field, in *Warnock v. Davis,* 104 U. S. 775, it is not easy to define with precision what will constitute such an interest, it may be stated generally to exist whenever the relations between the insured and the beneficiary are such as to justify a reasonable expectation that the continuance of the life of the former will result in advantage or benefit to the latter."

Thomas v. Nat. Ben. Assn., 84 N. J. L., 281, 282.

"Indeed, it may be said generally that any reasonable expectation of pecuniary benefit or advantage from the continued life of another creates an insurable interest in such life. * * * The essential thing is that the policy shall be obtained in good faith, and not for the purpose of speculating upon the hazard of a life in which the insured has no interest."

Conn. M. L. Ins. Co. v. Schaefer, 94 U. S. 457, 460.

"The very meaning of an insurable interest is an interest in having the life continue and so one that is opposed to crime. And, what perhaps is more important, the existence of such an interest makes a roughly selected class of persons who by their general relations with the person whose life is insured are less likely than criminals at large to attempt to compass his death."

Grigsby v. Russell, 222 U. S. 149, 155.

See, also,

May on Insurance, Sec. 76.

25 Cyc. 706.

Kentucky Ins. Co. v. Hamilton, 63 Fed. 93.

Kopetovske v. Mutual L. Ins. Co., 187 Fed. 499.
Mechanics Bank v. Comins, 72 N. H. 12.
Keckley v. Glass Co., 86 Oh. St. 213.
Mutual L. Ins. Co. v. Board, 115 Va. 836.
Wurzburg v. N. Y. Life Ins. Co. (Tenn.), L. R. A. 1918 E, 566.
Conn. M. L. Ins. Co. v. Luchs, 108 U. S. 498.

Smith, Rumsey and Gignoux had been intimate business associates for many years. In a comparatively small and close corporation like Benson, Smith & Company it is reasonable that the officers who were the principal stockholders should desire to retain all, or most, of the shares within their control. It is easy to imagine how the death of one of the three associates might, in the language of Vance, above quoted, result in the corporation suffering detriment if the stock held by one of them should pass into the hands of strangers or competitors. At the time the policy was taken out Rumsey was not only an officer and a stockholder, but by long association in the business had become familiar with its management and conduct. Certainly the company was interested in the continuation of his life. In the event of his death the company was entitled to the benefit of the insurance money to give it an advantage over others in the purchase of the stock so as to prevent its going into unfriendly hands. As an officer and a principal stockholder in the company Rumsey owed it such a moral obligation to see it through any difficulties that might have arisen as was referred to in the New Jersey case above cited.

The whole transaction of which the policy in question was a part was characterized by that good faith which was said to be the essential element in the Schaefer case. And the circumstances were entirely lacking in any of the earmarks of a wagering contract within the description of such a contract given by the Supreme Court of the United States. Public policy in connection with wagering contracts goes no further than to condemn what would create a condition where "the unscrupulous are free to bet on what life they choose," and to guard against "the danger that might arise from a general license to all to insure whom they like." *Grigsby v. Russell,* supra. No such element enters into the case at bar in the remotest degree. Certainly a holding that Benson, Smith & Company had an insurable interest in Rumsey's life would fall far short of a general license to all to insure whom they like.

There having been an insurable interest at the time the policy was obtained, the termination of such interest would not affect the right of the beneficiary to hold and recover on the policy.

Conn. M. L. Ins. Co. v. Schaefer, 94 U. S. 457, 461.

Wurzburg v. N. Y. Life Ins. Co. (Tenn.), L. R. A. 1918 E, 566.

Davis v. Brown, 159 Ind. 644, 646.

Courtois v. Grand Lodge, 135 Cal. 552.

Appeal of Carson, 113 Pa. St. 438, 447.

Keckley v. Glass Co., 86 Oh. St. 213, 228.

If the policy in question was taken out by Rumsey in favor of Benson, Smith & Company an insurable interest was not necessary.

"That one has an unlimited insurable interest in his own life is an elementary principle, as to the existence of which the cases are unanimous. It follows, therefore, that one may take out a policy of insurance on his own life and make it payable to whom he will. It is not necessary that the person for whose benefit it is taken should have an insurable interest."

1 Cooley's Briefs on Insurance, p. 252, and cases there cited.

Where a life insurance policy provides that no change of beneficiary shall take effect unless endorsed on the policy by the company at its home office, a change is not effected until the condition is fulfilled.

Freund v. Freund, 218 Ill. 189.
Rumsey v. N. Y. Life Ins. Co., 59 Colo. 71.
Sullivan v. Maroney, 76 N. J. E. 104.
Lloyd v. Royal Ins. Co., 245 Fed. 162.
Sangunitto v. Goldey, 84 N. Y. S. 989.

If, as we contend the fact here was, the policy in question was part of a mutual agreement between three men which rested on a valuable consideration moving between them, the interest of each party in his own life will support the transaction.

"There is no doubt that a man may effect an insurance on his own life for the benefit of a relative or friend; or two or more persons, on their joint lives, for the benefit of the survivor or survivors."

Conn. M. L. Ins. Co. v. Schaefer, supra.

In the case of *Jory v. Supreme Council,* 105 Cal. 20, 29, where the appellant claimed that she and her mother had entered into a mutual agreement whereby each should join a benefit society and make the other a beneficiary, and that she had carried out the agreement by paying dues, assessments, etc., the court said, "If these moneys were paid out by appellant under and by virtue of a contract between the parties, and in pursuance of this agreement for mutual insurance, then she has equities which entitle her to recognition in a court of justice."

Benson, Smith & Company had a vested right in the policy in question which was not defeated, and could not be defeated without its consent. Where, as here, the policy provides a certain method for changing the beneficiary, i. e., by endorsement on the policy by the company at its home office, such change can be made only in that way. Where a policy has been assigned, pledged or otherwise placed in the possession of one pursuant to some contract, the possession is an effectual pledge or guarantee that no change of beneficiary will be made. So long as the beneficiary holds the policy under such agreement, no change can be made. It is a stipulated fact (Tr., p. 122) "that in accordance with said agreement the policies of insurance so taken out were placed in the custody and possession of Benson, Smith & Company." It doubtless was the purpose of Smith, Rumsey and Gignoux that the company should, by virtue of its possession of the three policies, be secured in the carrying out of the agreement so entered into. No one of them could legally withdraw from the agreement and demand his policy in the manner a

tempted by Rumsey. A valuable consideration had already moved to him, i. e., the right of participating in the benefit which would have accrued to the company had either Smith or Gignoux died. That benefit having accrued to him it could not be returned. For several years he had had, as a stockholder in Benson, Smith & Company, the protection of the insurance on the lives of Smith and Gignoux. That Rumsey fully understood that is shown by his letter to Smith dated March 29, 1907 (Tr., p. 143), wherein he said, "My stock interests carries a limited benefit pro rata in all the policies issued for the benefit of the firm." The fact that he also expressed an erroneous view of his legal rights in the premises does not detract from the force of the statement quoted. Reference was made in the opinion of the trial judge to Smith's letter to Rumsey of January 22, 1907, in which he suggested that the policy could be assigned to Rumsey "after the payments for all your stock have been made and on the repayment to the firm of the amounts expended for annual premiums" (Tr., p. 141). That in no sense purported to be a statement of the purpose for which the policy had been taken out. At best it was a mere offer made by Smith entirely irrespective of the original object for which the insurance had been obtained, and altogether aside from any legal rights of the parties in the premises. That Smith, or the corporation, in 1907, was willing to do something which he or it was not legally obliged to do is entirely immaterial now,

especially as the suggestion or offer then made was not accepted or acted upon.

Benson, Smith & Company having a vested right in the policy, as the beneficiary named in it, no act of Rumsey or his wife could have defeated that right unless the company had voluntarily acquiesced by giving up the policy so that the beneficiary could be changed in the manner stipulated in the policy.

Even under the law applicable to death benefits in mutual beneficial societies where the beneficiary named in a certificate ordinarily has no vested right such a right may be acquired where, as in this case, a valuable consideration moved from the beneficiary.

Stronge v. K. of P., 189 N. Y. 346.
Grimbley v. Harrold, 125 Cal. 24.
Bernard v. Grand Lodge, 13 S. D. 132.

If the policy in question is to be regarded as Rumsey's, then the uncontradicated facts show that he assigned or pledged it to Benson, Smith & Company for a valuable consideration, namely, the payment of the premiums and the interest which Rumsey was given, through the company, in the policies on the lives of Smith and Gignoux.

"In the absence of any requirement in the policy or by statute that the assignment be in writing, a parol assignment accompanied by delivery of the policy is sufficient; and the delivery of the policy alone with intent that such delivery shall operate as an assignment is sufficient."

25 Cyc. 767.

See, also,

State v. Tomlinson, 16 Ind. App. 662.
Chapman v. McIlwrath, 77 Mo. 38.
Marcus v. Ins. Co., 68 N. Y. 625.

An insurance policy may be validly pledged by delivery without written assignment.

In re Baird, 245 Fed. 504, 507.

We are unable to see wherein the agreement, of which the policy in question formed a part, which was entered into in entire good faith by all the parties to it, and constituted a straightforward business arrangement, is contrary to public policy. At one time there seemed to be a disposition to overwork the public policy idea, but now the courts are less disposed to interfere with the agreements of parties where they do not interfere with the rights of others or the public welfare.

Robinson v. Thurston, 248 Fed. 420.

We contend, therefore, that upon no possible theory which the facts of this case permit of could the appellant prevail.

IF THE APPELLANT WAS EVER ENTITLED TO THE RELIEF PRAYED FOR IN HER BILL HER RIGHT WAS BARRED BY HER LACHES.

Under Section 2633 of the Revised Laws of Hawaii, 1915 (see Appendix), the period of limitation in actions of debt, assumpsit and replevin is six years.

Rumsey demanded possession of the insurance policy in his letter of August 30, 1907 (Tr., p. 156),

and the refusal to comply with the demand was contained in Smith's letter of September 25, 1907 (Tr., p. 162). All of the merits of the case were involved in that demand. It was made in order that the beneficiary could be changed in the manner provided in the policy. If Rumsey was then entitled to the possession of the policy he could have maintained an action of replevin for it. The statute of limitations began then to run and continued to run. Mrs. Rumsey stands in the shoes of her late husband. This suit was commenced on July 20, 1915, or nearly eight years after the cause of action accrued. The bill in this suit prays that the policy be reformed by declaring the complainant to be the beneficiary thereunder and that Benson, Smith & Company be declared the trustee of the policy for the complainant (Tr., p. 20). In other words, the relief sought by the bill is substantially the same as would have been obtained by an action of replevin for the policy.

It is an established rule that courts of equity, in determining the rights of parties before them, will either follow the statute of limitations applicable to the facts, or apply them by analogy. The statute having fixed the period of limitation by which a claim, if it had been made in a court of law, would have been barred, it is by analogy confined to the same period when asserted in a court of equity.

Willard v. Wood, 164 U. S. 502.
Carroll v. Green, 92 U. S. 509.
Hall v. Law, 102 U. S. 461.
Mandeville v. Lane, 28 Miss. 312.

Hawley v. Cramer, 4 Cow. (N. Y.) 717.
Kalaeokekoi v. Kahele, 5 Hawaii 47.
Williams v. Gulick, 6 Hawaii 162.
Hilo v. Liliuokalani, 15 Hawaii 507.

Viewed merely as a suit for an accounting, the remedy would be barred even though the cause of action did not accrue until the date of Rumsey's death, July 27, 1910.

Under Section 2638 of the Revised Laws of Hawaii, 1915 (see Appendix), an action to recover money upon a cause of action which arose in a foreign country must be commenced within four years after it accrued.

The policy in question was issued by the New York Life Insurance Co. in New York. The insurance money, by the terms of the policy, was payable in New York. It was, therefore, a New York contract.

An action on a contract, however, is governed by the law of the jurisdiction in which it is brought.
25 Cyc. 1018.

This suit not having been commenced within four years after Rumsey's death, the remedy by way of a decree for the payment of money was barred by the lapse of time.

We contend that (1) this appeal should be dismissed because not taken from a final decree, and

that (2) upon the merits of the case there should be a decree dismissing the bill of complaint.

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APPENDIX.

Revised Laws of Hawaii, 1915.

(Formerly Secs. 1971, 1976, R. L. Haw. 1905.)

Sec. 2633. Six Years. The following actions shall be commenced within six years next after the cause of such action accrued, and not after:

1. Actions for the recovery of any debt founded upon any contract, obligation or liability, excepting such as are brought upon the judgment or decree of some court of record;

2. Actions upon judgments rendered in any court not being a court of record;

3. Actions of debt for arrearages of rent;

4. Actions for taking, detaining or injuring any goods or chattels, including actions of replevin;

5. Special actions on the case for criminal conversation, for libels, or for any other injury to the persons or rights of any, except as otherwise provided.

Sec. 2638. Four Years. The following actions shall be commenced within four years after the cause of action accrued and not after. Actions for the recovery of any debt founded upon any contract, obligation or liability, where the cause of action has arisen in any foreign country, except such as are brought upon the judgment or decree of a court of record.